Pl's Ex A- Lyon MSC MOAA Order

Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

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March 23, 2022

164191 & (5)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 164191
COA: 360548
Genesee CC: 21-047378-FH

NICHOLAS LYON,
Defendant-Appellant.

_____/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application for May 4, 2022. MCR 7.305(H)(1).

The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing: (1) whether MCL 767.3 and MCL 767.4 violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2; (2) whether those statutes confer charging authority on a member of the judiciary; (3) whether a defendant charged after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination; and (4) whether the proceedings conducted pursuant to MCL 767.3 and MCL 767.4 violated due process, Mich Const 1963, art 1, § 17. Each party may file a response brief by 5:00 p.m. on April 21, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 15 minutes for each side.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 21, 2022.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

a0323

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 23, 2022

Clerk

Pl's Ex B- Peeler MSC MOAA Order

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Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

March 17, 2022

163667

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163667
COA: 357754
Genesee CC: 21-047379-FH

NANCY PEELER,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the August 25, 2021 order of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application for May 4, 2022. MCR 7.305(H)(1).

The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing whether a defendant charged with a felony after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination. Each party may file a response brief by 5:00 p.m. on April 21, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 15 minutes for each side.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 21, 2022.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

a0316

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 17, 2022

Clerk

Pl's Ex C-Baird MSC MOAA Order

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Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

March 30, 2022

163672 & (26)(28)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163672
COA: 357715
Genesee CC: 21-047375-FH

RICHARD LOUIS BAIRD,
Defendant-Appellant.

_____/

By order of March 17, 2022, this case was held in abeyance for *People v Peeler* (Docket No. 163667). On the Court's own motion, we VACATE our abeyance order of March 17, 2022. The application for leave to appeal the August 25, 2021 order of the Court of Appeals is again considered. We direct the Clerk to schedule oral argument on the application for May 4, 2022. MCR 7.305(H)(1).

The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing whether a defendant charged with a felony after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination. Each party may file a response brief by 5:00 p.m. on April 21, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 10 minutes for each side. The motions to allow supplemental briefing and participate in oral argument are DENIED as moot.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 21, 2022.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

a0330

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 30, 2022

Clerk

Pl's Ex D-06.16.2021 Order Denying Defendants' Motions to Remand for Preliminary Exam

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STATE OF MICHIGAN

IN THE 7TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

JARROD AGEN
GERALD AMBROSE
RICHARD BAIRD
DARNELL EARLEY
NANCY PEELER,

Defendants.

Case No. 21-047372-FH (Agen)
21-047373-FH (Ambrose)
21-047374-FH (Ambrose)
21-047375-FH (Baird)
21-047376-FH (Earley)
21-047377-FH (Earley)
21-047379-FH (Peeler)

HON. ELIZABETH A. KELLY

/

ORDER DENYING DEFENDANTS' MOTIONS TO REMAND FOR PRELIMINARY EXAMINATION

At a session of said Court held at the Courthouse
In the City of Flint, County of Genesee, Michigan
Wednesday, June 16, 2021:

PRESENT: THE HONORABLE ELIZABETH A. KELLY

I. INTRODUCTION

JARROD AGEN, GERALD AMBROSE, RICHARD BAIRD, DARNELL EARLEY, and NANCY PEELER (hereinafter "Defendants") have filed with this Court motions requesting remand for preliminary examination concerning the above-captioned cases. RICHARD BAIRD filed a "Motion to Proceed Upon a Formal Complaint in Conformity with MCL 767.4 and for Remand for Preliminary Exam" and NANCY PEELER filed a "Motion for Preliminary Examination." Briefs were submitted and oral arguments were tendered on April 6, 2021. Additionally, all of the above-captioned Defendants endorsed each other's arguments. As a result,

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this order addresses and responds to all of Defendants' arguments and filings related to motions to remand for preliminary examination.

Pursuant to MCL 767.3 and MCL 767.4, Defendants were indicted by a one-person grand jury. Defendants now seek relief from this Court in the form of a remand to district court for preliminary examination. At the core of Defendants' argument is the assertion that the one-person grand jury does not actually function as a citizen's grand jury. More specifically, Defendants claim that the one-person grand jury solely performs an investigatory function, which entitles Defendants to preliminary examination upon request. This Court disagrees and does not find Defendants' arguments persuasive for the reasons set forth below.

II. STANDARD OF REVIEW

Although the standard of review was neither addressed by the People nor Defendants, the majority of the issues presented in Defendants' motions relate to the application and interpretation of the one-person grand jury statutes. "[I]t is well established that the interpretation and application of statutes is a question of law that is reviewed *de novo*." *People v Webb*, 458 Mich 265, 274 (1998) (emphasis added). Therefore, the application and interpretation of the one-person grand jury statutes are reviewed *de novo*. Likewise, to the extent that Defendants' motions address constitutional questions, those issues are reviewed *de novo*. *Wayne Co v Hathcock*, 471 Mich 445, 455 (2004).

III. DEFENDANTS HAVE NO RIGHT TO A PRELIMINARY EXAMINATION FOLLOWING AN INDICTMENT

As conceded by Defendants, a citizens' grand jury issues indictments and those indicted by a citizens' grand jury have no right to preliminary examination. Although enthusiastically argued, Defendants' assertion that indictments issued by a one-person grand jury do not foreclose

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Defendants' right to preliminary examination is without merit. Regardless of whether indicted by citizens' grand jury or one-person grand jury, indictees have no right to preliminary examination. See *People v Glass*, 464 Mich 266, 283 (2001); *People v Green*, 322 Mich App 676, 685 (2018); *People v McGee*, 258 Mich App 683, 695 (2003).

A. The One-Person Grand Jury Issues Indictments

The statutes that create the citizens' grand jury and the one-person grand jury grant those bodies the power to issue indictments upon a finding of probable cause. See MCL 767.4; MCL 767.3; MCL 767.23.

The Michigan Compiled Laws create the citizens' grand jury and provide it with authority to issue indictments upon a finding of probable cause. More specifically, MCL 767.23 states that in a citizens' grand jury, "No indictment can be found without the concurrence of at least 9 grand jurors." Moreover, MCL 767.23a states, "A [citizens' grand jury] may indict a person for an offense committed in any county over which the grand jury has jurisdiction." Likewise, the Michigan Compiled Laws grant the one-person grand jury authority to issue indictments upon a finding of probable cause. See MCL 767.3; MCL 767.4. Notably, MCL 767.3 states in relevant part:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have **probable cause** to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

MCL 767.3 (emphasis added). Additionally, MCL 767.4 states in relevant part:

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> If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is **probable cause** to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or **indictment**, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or **indictment**, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena.

MCL 767.4 (emphasis added).

In *Green*, the Michigan Court of Appeals indicated that the one-person grand jury issues indictments after a finding of probable cause. *Green*, 322 Mich App at 687. The court stated, "[B]ecause [the one-person grand jury] is an alternative charging procedure, it does not replace . . . the preliminary examination as defendant asserts." *Id.* (quotations omitted). Both the one-person grand jury and the preliminary examination "serve the same function: to determine whether there is probable cause to believe that a person committed a crime." *Id.* "Moreover, in both a one-person grand jury and a preliminary examination, the individual who decides whether there is probable cause is the same: a judge. MCL 767.3 (one-person grand jury); MCL 766.13 (preliminary examination)." *Id.*

Parallel to a citizens' grand jury, a one-person grand jury has the power to issue indictments upon a finding of probable cause. Here, the Honorable David Newblatt acted as a one-person grand jury and returned indictments against Defendants pursuant to MCL 767.3 and MCL 767.4. As noted above, MCL 767.4 states, "If . . . the judge shall be satisfied that . . . there is **probable cause** to suspect any person to be guilty thereof, he may cause the apprehension of such person . . . and . . . shall proceed with the case . . . in like manner as upon formal complaint." MCL 767.4 (emphasis added). Additionally, MCL 767.4 goes on to say, "The judge conducting the inquiry under [MCL

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767.3] shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or **indictment**[.]" MCL 767.4 (emphasis added). In *Green*, the Michigan Court of Appeals, provides a useful interpretation of MCL 767.3 and 767.4. The court indicated that MCL 767.3 and MCL 767.4 are the statutes that create the one-person grand jury. *Id.* In fact, according to the court's interpretation of MCL 767.4, the statute directs the trial court to "proceed with the case after the one-person grand jury returns an indictment." *Id.* at 685 (quotations omitted). Likewise, the court held that the one-person grand jury issues these indictments after a finding of probable cause. *Id.* at 687. Therefore, the case law is clear: upon a finding of probable cause, a one-person grand jury returns an indictment and MCL 767.4 directs the trial court to proceed with the case following the issuance of that indictment. Thus, this Court finds that the one-person grand jury does in fact issue indictments and does not merely perform an investigatory function.

B. A Defendant Charged by Grand Jury Indictment is Not Entitled to a Preliminary Examination

The Michigan Supreme Court and the Michigan Court of Appeals have held that indictees have no right to preliminary examination. This legal standard is not predicated on whether the issuing body is a citizens' grand jury or a one-person grand jury. See *Glass*, 464 Mich at 283; *Green*, 322 Mich App at 685; *McGee*, 258 Mich App at 695.

In *Glass*, the Michigan Supreme Court discussed a defendant's right to preliminary examination and the impact of an indictment. *Glass*, 464 Mich at 278-79. The Court indicated that a defendant has no "right to indictment by grand jury; rather, indictment by grand jury is an alternative charging procedure created by the legislature." *Id.* at 287. The Court asserted that "[t]he establishment of the right to a preliminary examination is more than a matter of procedure and

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beyond the powers vested in the Court . . . ; it is a matter of public policy for the legislative branch." *Id.* at 282-83. Importantly, the Court ruled that indictees have no right to a preliminary examination. *Id.* at 283.

In *McGee*, the Michigan Court of Appeals expressed the Michigan Supreme Court's earlier assertion that indictees have no right to a preliminary examination. *McGee*, 258 Mich App at 695. The court stated that a defendant "does not have a constitutional right to a preliminary examination, a procedure established by the Legislature . . . and recognized by court rule." *Id.* In accordance with *Glass*, the Michigan Court of Appeals reasoned, "Where a criminal prosecution is initiated by the filing of an information rather than by indictment, the accused has a statutory right to a preliminary examination." *Id.* Similarly, in *Green*, the Michigan Court of Appeals again indicated that indictees do not have a right to preliminary examination. *Green*, 322 Mich App at 685.

Here, Defendants were indicted by a one-person grand jury and, as established from the foregoing caselaw, defendants charged by a grand jury are **not** entitled to a preliminary examination. In *Glass* and *Green*, the appellate courts noted each of the defendants were indicted by grand juries. Additionally, none of these cases established separate rules for indictments issued by one-person grand juries and citizens' grand juries. What these cased did establish, however, is that defendants who have been indicted by a grand jury are not entitled to a separate preliminary examination. Thus, as each Defendant here was indicted by a grand jury, they are not now entitled to remand to the district court for a preliminary examination.

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C. Indictments Issued By One-Person Grand Juries and Citizens' Grand Juries are Equal in the Eyes of the Law

Indictments issued by a one-person grand jury carries equal weight to indictments issued by a citizens' grand jury. In both situations, indictments are issued by a grand jury after the finding of probable cause. See *Green*, 322 Mich App at 687.

The Michigan Court Rules acknowledge that a grand jury may be comprised of a single grand juror. See MCR 6.107(A); MCR 6.005(I)(1). For example, MCR 6.107(A) states, "Whenever an indictment is returned by a **grand jury or a grand juror**, the person accused in the indictment is entitled to the part of the record, including a transcript of the part of the testimony of all witnesses appearing before the **grand jury or grand juror**[.]" MCR 6.107(A) (emphasis added). Additionally, MCR 6.005(I)(1) states, "A witness called before a **grand jury or a grand juror** is entitled to have a lawyer present in the hearing room while the witness gives testimony." MCR 6.005(I)(1) (emphasis added).

In *Green*, while discussing a defendant's right to counsel, the Michigan Court of Appeals said, "[T]he one-person grand jury procedure is used to determine whether criminal proceedings should be instituted against an individual by way of an indictment[.]" *Green*, 322 Mich App at 685. Moreover, the court indicated "in both a one-person grand jury and a preliminary examination, the individual who decides whether there is probable cause is the same: a judge. MCL 767.3 (one-person grand jury; MCL 766.13 (preliminary examination)." *Id.* at 687. In other words, in *Green*, the Michigan Court of Appeals made it clear that, like a citizens' grand jury, a one-person grand jury has the power to issue formal indictments. *Id.*

Moreover, when discussing indictments, the Michigan Court Rules use the phrase "grand jury or a grand juror." MCR 6.107(A); MCR 6.005(I)(1). The use of the word "or" indicates that

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the two forms of grand juries are interchangeable and are held in the same and/or similar light by the Michigan Court Rules. Additionally, nothing in the Michigan Court Rules indicate that indictments issued by a one-person grand jury are inferior to those issued by a citizens' grand jury.

The Michigan appellate courts are clear that one-person grand juries, like citizens' juries issue indictments after a determination of probable cause. Hence the court's language in *Green* that the "one-person grand jury procedure is used to determine whether criminal proceedings should be instituted against an individual by way of an indictment[.]" *Green*, 322 Mich App at 685. Taking this further, the case law illustrates that the one-person grand jury and citizens' grand jury perform the same function: they find the probable cause necessary to issue an indictment. This is precisely what has occurred in these cases and Defendants have not made a showing that the one-person grand jury's indictments carry less weight than those issued by a citizens' grand jury.

D. THE ONE-PERSON GRAND JURY SYSTEM DOES NOT VIOLATE DUE PROCESS

Defendants assert that the one-man grand jury system violates due process and the People failed to respond to Defendants assertion. However, Defendants rely on the following cases, which are not persuasive: *People v Duncan*, 388 Mich 489 (1972), overruled by *Glass*, 464 Mich 266 (2001); *In re Murchison*, 349 US 133 (1955); and *In re Oliver*, 333 US 257 (1948).

In *Duncan,* the Michigan Supreme Court opined the following dictum, "When the legislature did intend to provide for a preliminary examination after a one-man grand jury indictment, it did so by specific statutory language." *Duncan*, 388 Mich at 489-99. However, this 1972 case was expressly overruled in 2001 by *Glass*, where the Michigan Supreme Court stated, "*Duncan* expressly declined to rely on due process principles in creating the right to a preliminary

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examination." *Glass*, 464 Mich at 282. *Glass* further *Duncan* stated, "We are persuaded that *Duncan* and the implementing court rules exceed this Court's rulemaking authority." *Id.*

In *Murchison*, the United States Supreme Court ruled that it violated due process when "the same judge presiding at [a] contempt hearing had also served as the 'one-[person] grand jury' out of which the contempt charges arose." *In re Murchison*, 349 US 133, 134, 139 (1955). However, the Court neither examined whether the one-person grand jury system violates due process nor whether indictments issued by a one-person grand jury violate due process. *Id.* at 134.

In *Oliver*, the United States Supreme Court held that it violates due process for a one-person grand jury to convict a witness of contempt for conduct in the grand jury hearings. *In re Oliver*, 333 US 257, 278 (1948). However, the decision did not address whether the one-person grand jury system is unconstitutional. *Id.* at 264. In fact, the Court stated, "The petition does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge and therefore we do not concern ourselves with that question." *Id.*

Here, Defendants assert that the one-person grand jury system violates due process, unless the statute entitles Defendants to preliminary examination. The People unequivocally failed to provide this Court with any written argument relating to due process. Nevertheless, Defendants rely on loose arguments and irrelevant case law to no avail. The Defendants' three "key cases" speak directly to the one-person grand jury system, yet, they do not address the specific issue at hand: whether the one-person grand jury system violates due process.

Defendants cite dictum from *Duncan*, but *Duncan* was subsequently overruled by *Glass*. Even if *Duncan* had not been overruled by a contemporary Michigan Supreme Court case, "A statement that is dictum does not constitute binding precedent[.]" *Allison v AEW Cap Mgmt, LLP*, 481 Mich 419, 437 (2008). Here, Defendants rely on the Court's dictum to reveal the legislative

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intent behind the one-person grand jury system. However, this Court is not persuaded that Defendants' due process rights were violated because of counsels' erroneous citation to dictum plucked from a reversed opinion.

Defendants also unpersuasively cite *Murchison* and *Oliver*, two United States Supreme Court decisions regarding contempt hearings arising out of one-person grand jury proceedings. See *Murchison*, 349 US at 134; *Oliver*, 333 US at 278. Neither of these cases addressed whether the one-person grand jury system violates due process. In fact, in *Oliver*, the Court stated, "The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge and therefore we do not concern ourselves with that question." *Oliver*, 333 US at 264. The Defendants now use these cases to challenge the traditional inquisitorial grand jury power of the one-person grand jury—the very thing that the United States Supreme Court held it was not addressing in its opinion. Simply put, neither of these cases are relevant to the due process claim made by Defendants.[1] Ultimately, "[a] party may not leave it to this Court to search for authority to sustain or reject its position." *Leitch v Switchenko*, 169 Mich App 761, 764 (1988). It is not this Court's duty to find case law, statutory authority, or facts to justify Defendants' motion. As a result, this Court is not persuaded that the one-person grand jury violates due process.

IV. CONCLUSION

Defendants try to complicate an issue that, in essence, is straightforward: whether Defendants are entitled to preliminary examinations after being indicted by a one-person grand jury. They are not. Defendants are not entitled to preliminary examination because (1) one-person grand juries issue indictments after making a finding of probable cause; (2) indictees are not

[1] The Court notes that Defendants have provided other case law to attempt to sustain their position. However, these cases, like the ones noted above, are not persuasive.

entitled to a preliminary examination after such a finding; (3) one-person grand jury indictments and citizens' grand jury indictments are equal in the eyes of the law; and (4) the one person grand jury system does not violate due process. Therefore, Defendants have failed to state a claim for which relief may be granted. For the foregoing reasons, Defendants' motions are DENIED.

NOW THEREFORE, IT IS ORDERED: Defendant's Motions to Remand for Preliminary Examination are DENIED for the reasons stated above.

Dated: 6/16/2021

ELIZABETH A. KELLY (P71790)
Circuit Judge

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Pl's Ex. E-Dismiss Brief

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STATE OF MICHIGAN

IN THE 7TH JUDICIAL CIRCUIT, GENESEE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, No. 21-47378-FH

vs. Hon. Elizabeth A. Kelly

NICOLAS LYON,

Defendant-Appellant.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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I. Introduction

Half a century ago, the Michigan Supreme Court warned that the "constitutionality of a system whereby a Judge accuses a person of a crime may not withstand our re-examination." Now is the time to begin that re-examination.

This motion is a challenge to what is popularly – and erroneously – called the "one-person grand jury" statute, a criminal investigative provision unique to Michigan. The plain language of the statute does not authorize a judicial officer to do what was done here – file a criminal charge and simultaneously declare there to be probable cause. If the statute were construed to provide such authority, it would violate Michigan's constitutional requirement of separation of powers, because such a construction confers upon the judiciary functions exclusively reserved for the executive. The judicial officer's sole authority here was to investigate, not charge.

In ruling on motions in other cases, this Court has ruled that judicial inquiries and citizen grand jury investigations are equal in the eyes of the law and that the judicial inquiry process does not violate due process. With all due respect to those rulings, the instant motion presents different bases –constitutional and statutory – challenging the judicial officer's authority to charge apart from the authority to investigate, and it seeks a different form of relief – dismissal. To the extent the Court's prior ruling interprets the statute to confer charging authority on the judicial officer, such an interpretation renders the statute unconstitutional. A correct interpretation of the statutory scheme – which would avoid the constitutional question – does not authorize the judicial officer to charge.

The indictment must be dismissed, as the charge is outside the scope of the statute and this Court is entirely without jurisdiction even to entertain it.

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II. Facts

This case is the second prosecution of Nick Lyon, the former director of Michigan Department of Health & Human Services (MDHHS), for decisions he made in that position. The first was in 2017 – which resulted in the Attorney General voluntarily dismissing the case two years later in 2019 – and now there is the second in 2021, yet another two years later. To understand the challenges this motion presents, it is important to understand the history of the investigation into events surrounding the switch in the municipal water supply in the City of Flint that occurred in April 2014.

A. Round One: *People v Nicolas Leonard Lyon*, No. 18-43638-FH

1. The original charges

More than five years ago, on January 15, 2016, then-Attorney General Bill Schuette appointed a Special Assistant Attorney General, Todd Flood, to investigate Flint's switch in its municipal water supply. Mr. Flood established what he would call the Office of Special Counsel (OSC), hiring a legal and investigative staff to perform the prosecutorial functions of the office.

Over the course of its tenure, the OSC charged 15 people with various offenses, including employees of the Michigan Department of Environmental Quality (MDEQ), Michigan Department of Health & Human Services (MDHHS), and the City of Flint, together with two emergency city managers.[1] Mr. Lyon was charged in a four-count

[1]Charges against Michael Glasgow of Flint were dismissed early on, and six people – Adam Rosenthal, Michael Prysby, Stephen Busch and Liane Shekter-Smith of MDEQ, Corinne Miller of MDHHS, and Daugherty Johnson of the Flint Department of Public Works – all eventually pled guilty to misdemeanors.

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information alleging two counts of manslaughter, MCL 750.321, one count of misconduct in office, MCL 750.505, and one count of willful neglect of duty, MCL 750.478. Following a preliminary examination that took 26 days spanning 11 months, Mr. Lyon was bound over to circuit court on those charges on August 20, 2018.[2]

On bindover, the case was assigned to Hon. Joseph J. Farah under the caption, *People v Nicolas Leonard Lyon*, No. 18-043836-FH. Within three weeks of his bindover, on September 10, 2018, Mr. Lyon filed a motion to quash the bindover on the three felony charges and a motion to dismiss the single misdemeanor count.[3] The matter was fully briefed by the parties and set for oral argument in early February 2019.[4]

While handling the dispositive motion, Judge Farah became deeply knowledgeable about the underlying facts and the prosecution's novel legal theories. He read nearly 3,000 pages of preliminary examination transcript, reviewed over 200 exhibits, and studied hundreds of pages of briefing by the parties and amici. Over two full days of oral argument, he posed very tough questions for the prosecution

---

[2]Eden Wells (MDHHS) was also bound over to circuit court, and her case, No. 18-44241-FH, was assigned to Judge Farah. Gerald Ambrose, an emergency manager, waived his preliminary examination and was bound over to circuit court. The cases against Patrick Cook (MDEQ), Howard Croft (Flint), Darnell Earley (EM), Nancy Peeler (MDHHS), and Robert Scott (MDHHS) all remained in district court for completion of preliminary examinations.

[3]The OSC filed its Felony Information against Mr. Lyon on September 26, 2018. EXHIBIT A.

[4]Dr. Wells also filed a motion to quash on February 25, 2019, which was fully briefed by the parties and awaiting a date for oral argument at the time of dismissal.

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about the viability of its legal theories, especially as to the most serious charges of manslaughter.[5] At the conclusion of the second day of argument on February 6, 2019, Judge Farah announced that he planned to have a decision rendered within 90 days. It's fair to say that, based on Judge Farah's comments, he was prepared to issue a decision that severely undercut the prosecution's core theories.

2. The prosecution gets nervous and tries to delay a ruling

A new Attorney General was sworn in on January 1, 2019. Within days, the Attorney General appointed the Solicitor General to handle and supervise the pending prosecutions initiated by the OSC. "New Solicitor General Hammoud to Lead Flint Criminal Cases," ATTORNEY GENERAL PRESS RELEASE (Jan 15, 2019). After the Solicitor General attended and observed the prosecutor's disastrous showing at the first oral argument before, she sought from the circuit court a six-month stay claiming that her office had just "learned of the existence of millions of pages of documents, as well as phone extractions and other materials stored on hard drives

[5]Among the many questions the Court posed were the following:

> Because Corinne Miller by her testimony. . .quotes the director as saying he wanted to be kept informed, but she doesn't remember expressing any concern or facial expressions. . . . Anywhere in there does she say anything about, you know, I'm just going to use it in common parlance – Nick, get on this, put out a public notice, this is serious? (pp 12-13)
>
> What should the notice have said that would have gone out in January of '15? . .. Be on the lookout for what? Guard against what? Stay away from what? Don't drink Flint water? Don't shower with Flint water? What should it have said? This isn't a drinking illness. (p 19)
>
> Is there any authority that you have found where [MCL] 333.2221 has been the authority for charging somebody with manslaughter? (p 22)
>
> He did say in the January 28th meeting as reported keep me posted on this and try to get other records from McLaren. Isn't that enough? (p 58)
>
> We've established what their jobs are. We've established their hierarchy or roles. We've established that they were involved in the conversation. Now, let's get to this question. What did they say? What did they provide, emails, text messages, whatever the case may be? Other than the epi curve, what did they impart. . .to Director Lyon? (pp 62-63)

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recovered in a State-owned facility's basement" that it said had not been previously turned over by various state departments. PLAINTIFF'S REQUEST FOR STAY, pp 2-3. But the Department of the Attorney General, through another arm of its office, intervened to advise the circuit court that the Solicitor General's claims were untrue regarding undisclosed materials.[6] THE DEPARTMENT OF ATTORNEY GENERAL'S BRIEF EXPLAINING ITS INTERVENTION IN THIS CASE, p 1.

At a hearing on May 3, 2019, the court denied the Solicitor General's request for a six-month stay, and advised the parties that it would rule on the pending motion to quash on June 14, 2019. It noted that the Solicitor General would effectively have another six weeks to review the so-called previously undisclosed materials and advise the court if it found something concrete related to the case.[7]

---

[6]The challenge to the Solicitor General's specious allegations was quite graphic:

> The People alleged that the Department [of Attorney General] took direction from Mr. Lyon's defense attorney on what documents the Department's clients should produce in response to the Office of Special Counsel's (OSC) investigative subpoenas. *That is not true.*
>
> The People allege that the Department [of Attorney General] concealed millions of responsive documents from them in a basement. *That is not true.*
>
> The People allege that the Department [of Attorney General] failed to respond to the investigative subpoenas issued by the OSC. *That is not true.*
>
> The People allege that the Department [of Attorney General] represented that phone data did not exist when it did exist. *That is not true.*
>
> The People allege that the Department [of Attorney General] was complicit in an alleged destruction of evidence. *That is not true.*
>
> The People allege that the Department [of Attorney General] produced millions of pages of documents in a non-searchable format. *That is not true.*

[7]In the meantime, on May 8, 2019, the court denied the defendant's motion to dismiss the misdemeanor count, and the defendant filed an application for leave to appeal with the Court of Appeals. The application was then voluntarily dismissed following entry of the motion for *nolle prosequi.*

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3. The prosecution voluntarily dismisses to avoid a bad ruling

The Solicitor General brought nothing additional to the court's attention during that six-week accommodation. Instead, the day before the court was scheduled to rule on the motion to quash, the Solicitor General filed a motion for *nolle prosequi* terminating the prosecution against Mr. Lyon and others. By voluntarily dismissing on June 13, 2019, the prosecution ducked a potentially disastrous outcome on the felony charges, a decision that would have issued the very next day.

B. Round Two: *People v Nicolas Lyon*, No. 20-47378-FH

The Solicitor General waited another six months and then presumably and secretly petitioned the circuit court to conduct a "one-person grand jury" investigation, which took another year to complete. It did so in the apparent belief that such a secret investigation would deprive the defendants of a preliminary examination.[8]

On January 9, 2020, Hon. Duncan M. Beagle, Chief Judge of 7th Judicial Circuit, appointed Hon. David M. Newblatt as a "one-person grand juror" pursuant to MCL 767.3. EXHIBIT C (Order at 3 (Feb 8, 2021)). Although MCL 767.3 expressly requires that such appointments "shall be made in accordance with the rules of such court," the 7th Judicial Circuit has no rules on the subject.[9] Such proceedings are

[8]EXHIBIT B ("New Flint water criminal cases will move faster than former court proceedings: All nine defendants will go straight to trial under grand jury process," ABC 12 NEWS, www.abc12.com/2021/01/14/new-flint-water-criminal-cases-will-move-faster-than-former-court-proceedings/(Jan 14, 2021)).

[9]EXHIBIT D. Other counties have specific rules establishing the method for reviewing and approving applications and appointing judges to conduct investigations. *See, e.g.,* Ingham County, 30th Judicial Circuit (Rule 6.107); Oakland County, 6th Judicial Circuit (Rule 6.107).

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required to commence upon an application and order, both of which have yet to be disclosed, but it appears that proceedings began on January 23, 2020, and were "completed" on December 23, 2020. ORDER at 3 (Feb 9, 2021). Even though matters were completed on December 23, 2020, the grand juror signed some of the "indictments" long before then without filing them. Some charges were signed on March 16 and September 1, 2020. Others were signed *after* matters were completed – on January 8, 2021. Moreover, all of the charges were filed on the same date, January 13, 2021, after matters concluded, and by the Attorney General, not the grand juror.

On January 13, 2021, a "Grand Jury Felony Indictment," signed by Judge Newblatt, was filed in this court charging Mr. Lyon with nine counts of involuntary manslaughter, MCL 750.321, and one count of willful neglect of duty, MCL 750.478. EXHIBIT E. Filed on the same day were "Grand Jury Felony Indictments" against six other defendants and misdemeanor "Grand Jury Indictments" against two others.[10] All of the cases were also given a "confidential/non-public file" designation, No. 2020-113791-PZ.

Although seven of the nine defendants had been previously charged with similar offenses in cases that the Attorney General voluntarily dismissed in 2019 for strategic reasons, all of these charges are the product of the "one-person grand jury"

[10]The felony cases are *People v Jarrod Peter Agen,* No. 21-047372-FH, *People v Gerald Ambrose*, Nos. 21-047373-FH, 21-047374-FH, *People v Richard Baird*, No. 21-047375-FH, *People v Darnell Earley*, Nos. 21-047376-FH, 21-047377-FH, *People v Nancy Peeler*, No. 21-047379-FH, and *People v Eden Wells,* No. 21-047380-FH. The misdemeanor cases are *People v Richard Snyder*, No. 21G-0046-SM and *People v Howard Croft,* No. 21G-0047-SM.

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investigation. As stated above, the Attorney General has openly acknowledged that they chose this unique investigative process in order to deprive the defendants of a preliminary examination. EXHIBIT B.[11]

The statute requires that within 90 days of concluding an investigation, a "public accounting" is to be filed detailing monies disbursed by or at the direction of the judge handling the inquiry. MCL 767.6b. On April 9, 2021, more than 90 days after matters were "completed," the juror filed an accounting indicating that no monies had been disbursed by him or at his direction. EXHIBIT F (Public Accounting Apr 9, 2021). The judicial officer spent no money even though the investigation spanned 11 or 12 months during which 45 witnesses appeared and 1,400 exhibits produced.

C. Perspective: History of the Judicial Inquiry Statute

Michigan's oft-criticized judicial inquiry statute has a long and tumultuous history. First enacted in 1917 and entitled, it grew out of a recommendation of the Committee on Law Reform of the Michigan State Bar Association in 1915. Robert G. Scigliano, *The Michigan One-Man Grand Jury & the Courts: An Appraisal*, 37 U DET LJ 432 (1960). In fact, its origins can be traced back to when Detroit police courts were established and given inquisitorial powers. 1885 PA 161, § 20; Joannes Buiteweg, *History of Michigan's One-Man Grand Jury*, 33 U DET LJ 399 (1956).

[11]Irrespective of the Attorney General's opinion, we respectfully submit and will demonstrate that defendants do, in fact, have a right to a preliminary examination following a charge by arising from a judicial inquiry under MCL 767.3

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The purpose of the statute was investigatory and designed to strike a balance between the "unwieldy and ineffective" citizen's grand jury and the limited powers regular law enforcement had at the time to conduct public corruption and organized crime investigations. *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). It was an attempt to apply the traditional powers of the judiciary to compel the attendance of witnesses and grant immunity. *Id.* But, because the original enactment referenced the secrecy and immunity provisions of the citizen's grand jury statute, the judicial inquiry proceedings began to be equated with grand jury proceedings and the media began using the term "one-man grand jury" to describe the statute. *Oakman v Recorder of City of Detroit*, 207 Mich 15; 173 NW 346 (1919). Even though over 75 years ago the Michigan Supreme Court called the term a "misnomer," the term nevertheless took hold to describe judicial inquiry proceedings. *In re Slattery*, 310 Mich 458; 17 NW2d 251 (1945); Glenn R. Winters, *The Michigan One-Man Grand Jury*, 28 J AM JUD SOC 137, 138 (1945).[12]

Throughout its long history, the statute has been the subject of criticism and debate, including repeal in 1949 and a challenge at the constitutional convention in 1963, only to survive in its current form. Twice the United States Supreme Court has considered and restricted the statute's contempt provisions, *In Re Oliver*, 333 US 257 (1949), and *In Re Murchison*, 349 US 133 (1955), but it has never considered a direct challenge to the statute's structure, despite at least one justice's concern over

[12]The phrase first appears in caselaw in 1924 in *People v Doe*, 226 Mich 5; 196 NW 757 (1924). Given that the Supreme Court regards the term to be a misnomer, this brief refers to the statute as the "one-person judicial inquiry statute."

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its constitutionality. *In re Oliver*, 333 US 257, 279 (1948) (Rutledge, J) (the "aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law" and "cannot stand the test of constitutionality"). To this day, popular criticism and debate persist among scholars and legislators alike. Cohn, Hon. Avern, "Why the One -Man Grand Jury in Flint Case is Unfair," *Detroit News* (Mar 10, 2021), amp.detroitnews.com/story/opinion/2021/03/ 11/letter-why-one-man-grand-jury-flint-case-unfair/4645860001/; Editorial Board, "Michigan Should Scrap One-Man Grand Juries," *Detroit News* (Mar 5, 2021), www.detroitnews.com/story/opinion/2021/03/03/editorial-michigan-should-scrap-one-man-grand-juries/6889795002/. EXHIBIT G. In fact, legislation has been introduced to abolish the practice entirely. 2021 SB 159.[13]

The need for the one-person judicial inquiry disappeared a quarter of a century ago when the Legislature enacted the investigative subpoena statute. MCL 767A.1, *et seq*; 1995 PA 148. That act gives prosecutors the tools they need to investigate crimes with judicial enforcement of process and orders of immunity for testimony. Prosecutors can issue subpoenas for testimony and documents, and the judiciary is empowered to enforce the subpoenas. Moreover, secrecy provisions apply. The act was a major expansion of prosecutorial powers, designed to enhance investigations while avoiding the more complicated process of a citizen's grand jury.

In fact, investigative subpoenas were used liberally in round one of the so-called Flint water cases. But, of course, they are simply an investigative tool – not a

[13]For an excellent review and analysis of the statute's early history, see Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY (Michigan State Board of Agriculture 1957).

charging mechanism – so the prosecutor is left to charge by complaint and warrant followed by a preliminary examination provided for by statute.

No court, however, has considered whether the judicial inquiry statute confers upon the judicial officer the executive function of charging citizens with a crime and, if so, whether such a construction is constitutional.

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III. Argument

A. Interpreting the judicial inquiry statute to confer charging authority upon a judicial officer violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963 art III, § 2

In a 1972 case involving MCL 767.3 and 767.4, the Michigan Supreme Court warned that "[t]he constitutionality of a system whereby a Judge accuses a person of crime may not withstand our re-examination." *People v Bellanca*, 386 Mich 708, 715, 194 NW2d 863 (1972). In *Bellanca* the court ruled that the confrontation clause of the state constitution required production of transcripts of testimony taken by a one-person judicial inquiry.[14] Not briefed by the parties was the broader question of whether vesting a member of the judiciary with the power to indict – assuming the statute actually authorized it – violated separation of powers. The court left that question for another day. That day is today, and the statute cannot "withstand [this Court's] reexamination."

This constitutional violation only arises if the statute is interpreted as vesting the investigating judge with charging power. Fortunately, the statute can be logically interpreted as not conferring this executive function onto the judiciary; thereby avoiding the constitutional problem. The next section will describe the structure of the statute and why interpreting it as granting charging authority violates the separation of powers.

---

[14]Interestingly, the production was in contemplation of a preliminary examination being held. "We are persuaded that a defendant charged with perjury before a 'one man grand jury' must have access to the transcripts of the testimony of all witnesses for or against him given before the 'one man grand juror' in order to be accorded due process. In Michigan, the preliminary hearing is a judicial proceeding designed to establish probable cause that a crime has been committed and probable cause to believe the accused committed it. It is a critical stage of our criminal process." 386 Mich at 712.

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1. The structure of the one-person judicial inquiry statute

MCL 767.3 confers upon a judicial officer the power to perform an inquiry into whether crimes have been committed within the jurisdiction. Specific prerequisites apply. An investigation may be initiated only upon "the filing of [a] complaint." MCL 767.3. Then, only if the complaint demonstrates "probable cause to suspect [a] crime. . .has been committed within [the] jurisdiction" is a judge authorized to order "that an inquiry be made into the matter relating to such complaint." *Id*. Any order calling for an inquiry "shall be specific to common intent and scope of the inquiry." *Id*. Moreover, in counties such as Genesee "the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court." *Id*. If those requirements are met, the judicial officer may compel witnesses to appear and answer questions about alleged violation of law which is the subject of the inquiry. MCL 767.3.

If the inquiry satisfies the judicial officer that a crime has been committed and "that there is probable cause to suspect any person to be guilty thereof, he [the judicial officer] may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint." MCL 767.4. If the judicial officer does not make a presentment of a crime or wrongdoing as to any person who the judicial officer has caused to be apprehended, with the person's consent the judicial officer may file a "report of no finding of criminal guilt."

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Id. A "presentment" is not a formal charge; it is a statement of what wrongdoing has been found and generally forms the basis for a formal charge. *Bennett v Kalamazoo Circuit Judge*, 183 Mich 200; 150 NW 141 (1914).

Under this scheme, the judge acts as a criminal investigator, not an independent judicial officer charged with determining probable cause. It is to be an investigation "under the control of the judge and not under the control of either the prosecuting attorney or the Attorney General, one in which the public is interested, and which is intrusted by the statute to the judge." *In re Petition for Investigation*, 270 Mich 328; 258 NW 776 (1935) (per curiam). The statutes simply do not further provide authority for the judicial officer who conducted the inquiry to issue a formal charge, either by complaint or indictment. Charging comes after apprehension by process. To conduct an investigation, the judge has the authority to request members of the bar to assist in the investigation, but proceedings are under the control of the judge and not the Attorney General or prosecuting attorney. *Petition of Hickerson*, 301 Mich 278; 3 NW2d 274 (1942).

There are also limitations on such investigations. For example, witnesses may not be compensated apart from ordinary fees, and they may not be "employed in any capacity by the judge or by any person connected" with the investigation. MCL 767.3. All testimony must be taken before the investigating judge. *Id.* Moreover, an investigation "shall continue no longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months." MCL 767.4.

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This judicial inquiry process is markedly different from that applicable to citizen grand juries under MCL 767.7a, *et seq*. The citizen grand jury statute specifically provide for indictment by the grand jury's issuance of a true bill. MCL 767.23. The judicial inquiry statute does not. It has always provided for the case to proceed "as upon formal complaint."

Oakman v Recorder of City of Detroit, 207 Mich 15; 173 NW 346 (1919), is instructive as to the original intent of the judicial inquiry provision, prior to the nomenclature of "one-man grand jury" taking hold and influencing the view of the judicial inquiry process. In *Oakman*, the judicial officer conducting the inquiry issued a presentment, which was "an informal complaint and finding of probable cause." Then later, after the presentment, warrants and a complaint were issued. But the presentment was not the formal charging document, it is a probable cause finding by the judicial officer conducting the inquiry to be followed by a formal complaint. And, of course, upon the filing of a felony complaint the person charged is entitled to a preliminary examination.

2. Separation of powers limits the judicial officer's authority to investigating and does not authorize charging

The separation of powers between the executive, legislative and judicial branches of government is deeply embedded in the United States and Michigan Constitutions:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

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MICH CONST 1963 art III, § 2.

Separation of powers is a "bulwark against tyranny" designed, among other things, to ensure that the executive and judicial power does not end up in the same hands. *United States v Brown*, 381 US 437, 443 (1965). And "although the Legislature has the power to create causes of actions, it does not have the power to expand the judicial authority granted to the courts by the Michigan Constitution." *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 361; 792 NW2d 686 (2010). For that reason, "an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'" *Judicial Att'ys Ass'n v State*, 459 Mich 291, 305; 586 NW2d 894 (1998) (quoting *Employees & Judge of the Second Judicial District v Hillsdale County,* 423 Mich 705, 717; 378 NW2d 744 (1985) and *United States v Will*, 449 US 200, 228 (1980)). Any legislation which purports to confer "the exercise of powers belonging to either of the others, cannot be regarded as valid." *Houseman* v *Kent Circuit Judge*, 58 Mich 364, 367; 25 NW 369 (1885).

Any interpretation of the judicial inquiry statute which would grant a judge charging authority violates these fundamental precepts, and therefore the Michigan Constitution, because it would vest purely executive authority in the hands of a judicial officer. The indictment and prosecution of criminals is a uniquely executive function. *United States v Batchelder*, 442 US 114 (1979). Under the Michigan Constitution, the prosecutor – and the prosecutor alone – is the "constitutional officer

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entrusted with performing the executive function of bringing criminal charges against defendants." *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999); *see also Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-84, 194 NW2d 693 (1972). As stated by the Michigan Court of Appeals, under basic "separation-of-powers principles, the constitutional responsibility to determine the grounds for prosecution rests with the prosecutor alone." *People v Muniz*, 259 Mich App 176, 178; 675 NW2d 597 (2003).

The prosecuting attorney is an elected official responsible to the citizens of the county. MICH CONST 1963, art VII, § 4. As chief law enforcement officer of a county, the prosecutor has exclusive authority to decide whether to prosecute a person and what charges to file. *People v Williams*, 244 Mich App. 249, 251-52; 625 NW2d 132 (2001). "The prosecution is not for the benefit of the injured party, but for the public good." *Id* at 253. Thus, "the decision whether to dismiss a case or proceed to trial is within the prosecutor's sole discretion." *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995); *see also People v Killebrew*, 416 Mich 189, 200; 330 NW2d 834 (1982).

In recognition of the prosecutor's "sole" and exclusive authority, Michigan courts have routinely held that any interference of the prosecutorial function by the judiciary violates the constitutional requirement of separation of powers. *People v Muniz*, 259 Mich App 176; 675 NW2d 597 (2003)(court lacked authority to order prosecutor to issue new informations); *People v Jones*, 252 Mich App 1; 650 NW2d 717 (2002). So, for example, a judge does not have the authority to accept a guilty

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plea to a lesser charge over the objection of the prosecutor. *Genesee Prosecutor*, 386 Mich at 684. Judges cannot enter orders of *nolle prosequi* without the consent of the prosecutor (unless the prosecutor has abused its discretion) without violating the separation of powers. *People v Nelson*, 66 Mich App 60; 238 NW2d 201 (1975). And a judge's role in plea negotiations is limited to sentencing (a traditional judicial role) and not charging decisions. *Killebrew*, 416 Mich at 200; *see generally People v Sekelsky*, 2021 WL 2181069, No. 35214 (Mich Ct App May 27, 2021) (Beckering, J, concurring).[15]

Here, granting judges charging authority would go far beyond a judge participating in plea bargaining, issuing orders of *nolle prosequi* or ordering of new informations condemned in the foregoing cases. Rather, it goes so far as to purport to allow judges *to make the very charging decisions* which lie at the core of the executive power. The separation of powers prohibition against vesting judicial actors with prosecutorial authority lead future Justice Cardozo to strike down a "one-man grand jury" statute similar to Michigan's. Like the Michigan statute, the New York statute allowed for the appointment of a judge to investigate criminal activity. Justice Cardozo's description of the statute and ultimate conclusion are worthy of being quoted in full:

> [under the statute] the judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. . .. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing

[15]Attached as EXHIBIT I.

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> impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court.

Matter of Richardson, 247 NY 401, 411-12; 160 NE 655 (1928).

Justice Cardozo's logic applies with even greater force here. The separation of powers is so critical to the protection of liberty that the only time Michigan courts have allowed the sharing of executive power is when a statute doing so is "very limited and specific." *People v Trinity*, 189 Mich App 19, 23; 471 NW2d 626 (1991); *see also People v Payne*, 424 Mich 475, 482-83; 381 NW2d 391 (1985) (deputy sheriff who acts as a magistrate may not issue search warrants because that determination must be made by a person whose loyalty is to the judiciary alone, not law enforcement). Allowing a judge to prosecute is anything but "very limited and specific." Rather, "[i]t is well settled" in Michigan that the decision as to what charges should be pursued in any given case goes to the very core of the executive function vested solely with prosecutors. *See, e.g., People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998) ("decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor"). Indeed, a prosecutor is the constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants. *People v Conat*, 238 Mich App at 149. A statute purporting to take away this "sole discretion" and vest it with a coordinate branch is not "very limited and specific"; rather it undermines the careful tripartite form of republican government guaranteed by the Michigan and United States Constitutions. US CONST, art IV, § 4 (guarantee clause); MICH CONST 1963, art III, § 2 (separation of powers clause).

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3. Michigan authority supports the limited role of the judicial officer in a one-person judicial inquiry

The distinction between vesting courts with incidental authority to investigate criminality under the judicial inquiry statute and the core authority to indict is highlighted the 1967 case *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). The appellant in *Colacasides* was held in contempt for refusing to answer questions during the course of a judicial inquiry. On appeal, he challenged the judicial officer's authority to investigate offenses on separation of powers concerns. *Id* at 91. This case – which dealt solely with the power of the judicial official to investigate, not indict – turned on a provision of the Michigan Constitution which grants circuit court judges the authority to act as "conservators of the peace." The Court ruled that there was no separation of powers issue because "conservators of the peace" at common law possessed the power to *investigate* crime. *Id*.

For three reasons, *Colacasides* is not controlling here. First, as mentioned above, the case dealt solely with the power to investigate, *not* the authority to charge an individual with a crime. In terms of separation of powers, the power to "investigate" is not vested with any particular branch. The Michigan Constitution recognizes that both the executive and legislature have the power to investigate, which the Michigan Supreme Court has defined as a "quasi-judicial" task. MICH CONST 1963, art I, § 17 (recognizing legislative and executive authority to conduct "fair" investigations); *Buback v Romney,* 380 Mich 209, 218; 156 NW2d 549 (1968) (executive and legislative "investigations have tended to assume a quasi-judicial character"). When the judiciary engages in investigations, it is not contravening a

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power reserved to the executive or legislature, but rather engaging in a "quasi-judicial" task. *Id.* All three branches can investigate; but ultimately the power to charge belongs exclusively to the executive branch.

Second, the traditional powers of "conservators of the peace" has no analog today and, in any event, likely did not include the power to commence prosecutions. No Michigan court has ever specifically ruled that their power included the power to indict. Even if the judicial officer had authority under the "conservator of the peace clause" to perform the inquiry, that authority does not include the authority to charge one with a criminal offense. Conservators of the peace traditionally have the authority to issue arrest warrants for violations of the law, hold examinations, and commit to bail. *Averell v Perrott*, 74 Mich 296; 41 NW 929 (1889). Conservators of the peace also have the authority to investigate crime, *Application of Romney*, 381 Mich 1; 158 NW2d 564 (1968) (citing cases), and to order that bonds be posted in order to keep the peace. *In re Gosnell*, 234 Mich App 326; 594 NW2d 90 (1999); *In re Sanderson*, 289 Mich 165; 286 NW 198 (1939). As a conservator of the peace, the judge here simply did not possess authority to charge crimes, only investigate. The indictment is invalid and must be dismissed, as this court is without jurisdiction.

To further illuminate this point, a brief foray into ancient English criminal procedure is necessary, if for no other reason that *Slattery* and *Colacasides* took the same journey. Candidly, the history dating back to the 13th century of conservators is complex, and their role changed innumerable times over the millennium. By the 16th century, the appellation of "conservators of the peace" applied to two distinct

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offices: "sheriffs," who primarily exercised an executive function, and "justices of the peace," who served the judicial function.[16] What is clear is that by the reign of Mary the 1st in 1553-54, "conservators of the peace" were not allowed to act as both executors and jurists. As described in the seminal 1831 treatise on the topic *The Justice of the Peace and Parish Officer,* in 1553-54, Parliament passed a law providing that "no sheriff shall exercise the office of justice of the peace during the time that he acts as sheriff." 1 M Sess 2 c 8 s 2. The law was necessary, according to the treatise, because a conservator of the peace "cannot act at the same time both as judge and officer for so he would command himself to execute his own precepts." RICHARD BURNS AND THOMAS CHITTY, THE JUSTICE OF THE PEACE AND PARISH OFFICER (Oxford Press 1831). The notion that a judicial "conservator of the peace" could act as a prosecuting officer was rejected nearly 450 years ago for reasons that are equally valid today.

This point is implicitly recognized by the court in *Colacasides*, which stated the "constant function [of conservators]" was to "take" or receive charges and not "make" them. 379 Mich at 92. Put into the context of criminal procedure and constitutional rights as they exist in 2021, however, nothing in the history of the conservators of the peace suggests that the judicial branch has the power to investigate, charge, and then

[16]*See, eg*, Edward Hasted, "General history: Justices of the peace," in THE HISTORY AND TOPOGRAPHICAL SURVEY OF THE COUNTY OF KENT: VOLUME 1, pp 215-221 (Canterbury 1797) *available at* British History Online http://www.british-history.ac.uk/survey-kent/vol1/pp215-221 [accessed 28 June 2021](In "the 34th year of king Edward III" "conservators of the peace" were given the power to try felonies "and then they acquired the more honourable appellation of justices of the peace.); 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Ch. 34 (Little, Brown & Company 1908) (In middle age England, "the ordinary conservators of the peace were the sheriff, the coroner [and] the justices of the peace").

officiate at the trial of the accused. Certainly, the English Parliament in 1554 agreed that this power did not exist; as should this Court. Combining these three functions into the same branch violates separation of powers and the important checks and balances that come with it.

The third reason *Colacasides* does not control the situation here is that reflexively incorporating the English Common law of the 14th century into the Michigan Constitution as it exists today would ignore the last 240 years of constitutional jurisprudence. An understanding of the importance of separation of powers did not exist in the 1300's when the concept of conservator of the peace was first created. The separation of powers become a cornerstone of good governance nearly 400 years later when it was first discussed in detail in the writings of Montesquieu and Locke. *See, eg,* Montesquieu, THE SPIRIT OF THE LAWS, vol 1, trans Thomas Nugent (London: J Nourse, 1777), *pp 221-237, passim* ("There is as yet no liberty if the power of judging be not separated from legislative power and the executrix.") To ignore this history and rule that Judges can be prosecutors in 2021 because the Magistrate of Nottingham may or may not have had the power to engage in "indicting" someone in 1382 strains credulity. As pointed out by Justice Cardozo, "[c]enturies of common-law tradition warn us with echoing impressiveness that this is not a judge's work." *Matter of Richardson*, 247 NY at 411-12. Nearly another century has passed since those words were spoken in which Courts have consistently struck down efforts to weaken the separation of powers. As Justice Rutledge of the United States Supreme Court recognized in his review of the statute, the

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"aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law" and "cannot stand the test of constitutionality." To paraphrase the Michigan Supreme Court, "[t]he constitutionality of a system whereby a Judge accuses a person of crime [in the year 2021 cannot] withstand our re-examination." *People v Bellanca*, 386 Mich at 715.

This point was made evident in the Supreme Court's decision in *Morrison v Olsen*, a case involving the constitutionality of an independent prosecutor statute. 487 US 654 (1988). The statute allowed the Attorney General to ask a "special division" of federal court judges to appoint a special prosecutor to investigate claims against executive officials. The statute was challenged for violating the separation of powers.

The Court found for four reasons that vesting the appointment of an inferior and temporary executive official with the Court did not violate the "separation between the judiciary and the other branches of the Federal Government." 487 US at 680-81. A comparison of that decision with the judicial inquiry statute highlights the unconstitutionality of vesting indictment authority with a judicial officer.

First, the Court noted in *Morrison* that the United States constitution specifically authorized the appointment of "inferior" executive officials by "courts of law." *Id* at 679. Here, in contrast, nothing in the Michigan Constitution specifically authorizes Michigan Courts to commence the prosecution of criminal defendants.

Second, the Court noted that the powers granted to the judicial panel under the special counsel act were "passive," "administrative," and "ministerial" in nature,

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such as "receiving reports" or awarding attorneys' fees. *Id* at 681-85. Here, in contrast, deciding whether to file criminal charges is anything but "passive" and ministerial; rather it goes to the heart of the executive function.

Third, the Court placed great weight on the fact that the appointing court had no authority to supervise the activities of the special prosecutor, stating "[t]he Act simply does not give the [judges] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority." *Id* at 681. Here, the proposed interpretation of the one-person investigatory statue would go far beyond conferring supervisory authority to awarding the judiciary actual "prosecutorial authority."

Finally, the court noted that special prosecutor could be removed by the Attorney General "for cause" and was required whenever possible to abide by the rules laid down by the executive branch. Accordingly, the special prosecutor remained an executive officer under the control of the executive branch. *Id* at 695-96. Here, in contrast, the executive branch (*ie,* prosecutors) has no control whatsoever over the judicial official exercising prosecutorial authority. More importantly, the judicial official is subject only to the rules of the Court; not the rules that govern the activities of executive branch prosecutors. And, as discussed below, Genesee County never adopted any rules governing these kind of judicial investigations; meaning that the judicial official here had no rules to follow.

Justice Scalia's characteristically prescient dissent leads to the same conclusion. After first agreeing with the majority that the prosecutorial function

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belongs exclusively to the executive, *id* at 705, he observes that under the constitution, as is the case in Michigan, executive power rests exclusively with the executive, which does not mean *some* power; it means *all* of the executive power. *Id.* Congress' conferring some executive authority upon members of the judiciary is plainly proscribed by the separation of powers doctrine. So it is the case in Michigan under article II, section 2, of the constitution. If the judicial inquiry provisions are to be construed to give a member of the judiciary the authority to charge, they clearly violate the separation of powers doctrine.

4. The separation of powers violation here is all the more evident when the judicial inquiry statute gives unbridled authority to investigate and prosecute the highest members of the executive branch

The concerns which animate the Michigan Constitution's strict separation of power constitutional provision are particularly pronounced given the roles played by the indicted individuals. This case does not involve a lowly bank official, as in *Slattery*, or a bar owner accused of giving bribes, as in *Colacasides*. Rather, the judiciary here is seeking to bring charges against the highest executive officials, including the former governor and a member of his cabinet, Mr. Lyon, the director of MDHHS. One can scarcely imagine a greater attack on the separation of powers than a circuit judge initiating a prosecution of the highest officials in the executive branch.

The danger in allowing the judiciary to interfere with the executive function was recognized in *Buback v Romney*, 380 Mich 209; 156 NW2d 549 (1968), a case which involved a statute which allowed the judiciary to preside over hearings on whether an executive official should be removed from office. The Michigan Supreme

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Court held that the legislature could not delegate to the judiciary powers that circumscribe executive function – removal of an executive from office – without violating the separation of powers. Per the court:

> the separation of powers article would apply to a court as follows: No person (a judge) exercising powers (judicial power) of one branch (the court of justice which constitutes the judicial branch) shall exercise powers properly belonging to another branch.

Buback 380 Mich at 226.

The logic of *Buback* applies with even greater force here. In *Buback* the statute was struck down even though the invasion of the Executive's authority was minimal because the court only had the authority to preside over removal hearings and not to make the final removal decision. Here, in contrast, the investigatory statute has been incorrectly interpreted as giving the judiciary the final decision-making authority on the nature of the charges, the timing of the charges and who gets charged, all of which lie at the "very essence of prosecutorial discretion." *Morrison,* 487 US at 708 (Scalia, J, dissenting).

Allowing the judiciary to unilaterally bring charges against high executive officials without any check would invade the Executive's authority to "take Care that the Laws be faithfully executed"; a power granted solely to the governor and his appointed department chiefs. MICH CONST 1963 art V, §§ 1, 2 and 8. As the United State Supreme Court has noted, "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Nixon v Fitzgerald,* 457 US 731, 750 (1982). But this "intolerable" invasion is exactly what is occurring here. The

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judiciary, acting in secrecy, has decided to unilaterally bring charges against high executive officials, second guessing the scope of their constitutional duties, without the benefit of due process, a transparent preliminary exam and bypassing the charging discretion the Michigan Constitution vests solely with prosecutors. This is an "intolerable" invasion of separation of powers.

As illustrated below, however, the Court need not go so far as to find the statute unconstitutional. It need only find that the statute does not confer charging authority upon the judicial officer conducting the inquiry under MCL 767.3, *et seq*.

B. MCL 767.3 and 767.4 do not confer charging authority upon the investigating judicial officer making the indictment invalid and requiring dismissal

Whenever possible, Courts should interpret statutes to avoid constitutional dilemmas. *See, eg, House Speaker v Governor*, 443 Mich 560, 585; 506 NW2d 190 (1993) ("constitutional construction requires us, if possible, to avoid an interpretation that creates a constitutional invalidity"). Here, fortunately, the judicial inquiry statue can be logically interpreted as not granting the judiciary the power to indict.

In this case, the chief judge selected a colleague to conduct the inquiry and if he found probable cause, he could issue a presentment and arrest warrant based on those findings. He was not, however, authorized to issue a complaint or indictment. Yet, he was the sole signatory on the indictment, certifying that the "foregoing indictment is a TRUE BILL." EXHIBIT E.

It was the filing of the indictment by the judicial officer that purported to confer jurisdiction in the Court. The indictment, however, is invalid, because it was issued

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by a judge who was without authority to do so. This Court has no jurisdiction, and the charges must be dismissed.

In its recent Order Denying Defendants' Motions to Remand for Preliminary Examination filed in other cases, this Court reached a different conclusion. It concludes that MCL 767.3 and MCL 767.4 authorize a "one-person grand jury to issue indictments upon a finding of probable cause," citing *People v Green*, 322 Mich App 676; 913 NW2d 385 (2018). Nothing in the statutes, however, authorizes the "one-man grand juror" to issue an indictment, even if an indictment is the appropriate charging instrument to follow a judicial inquiry under the statutes.[17]

Green simply does not stand for the proposition that the "one-man grand juror" can issue an indictment. It does not even address this issue. The defendant in *Green* alleged ineffective assistance of counsel on the basis that counsel had not challenged his indictment for violations of rights to counsel and confrontation due to the use of the one-person judicial inquiry. In rejecting the claim, the court of appeals simply observed that the procedure

> is used to determine *whether criminal proceedings should be instituted* against an individual by way of an indictment, there is not yet a formal charge, *preliminary hearing*, indictment, information, or arraignment that indicates adversarial judicial proceedings have begun. . ..

[17]Much is sometimes made of the term "indictment" to suggest that it is the charging instrument used in grand jury proceedings. For almost a century, however, the Michigan Code of Criminal Procedure makes it clear that an "indictment" includes virtually all forms of charging instruments. MCL 761.1(g). Calling something an "indictment" does not make it a properly filed charge in the proper court. More importantly, neither MCL 767.3 nor MCL 767.4 refer to the charging instrument arising from a judicial inquiry to be an "indictment."

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322 Mich App at 685 (emphasis supplied).[18] *Green* actually acknowledges that the juror's function is limited to investigation, not charging. The closest the Michigan Supreme Court has come to addressing the question was in *People v Duncan*, 388 Mich 489, 498-99; 201 NW2d 629 (1972), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001). There, the Court noted how preliminary the judicial inquiry is by observing that the Legislature expressly intended to provide for a preliminary examination unlike the citizens' grand jury procedure.

> When the legislature did intend to provide for a preliminary examination after a one-man grand jury indictment, it did so by specific statutory language.

Duncan, 388 Mich at 498-99 (citing 1927 PA 175, ch VII, § 4; MCL 767.4[19]), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001).

To understand the role of *Duncan* in the jurisprudence of judicial inquiries three points are essential. First, *Glass* did not involve the judicial inquiry provisions. Second, the basis upon which *Glass* overruled *Duncan* was the prior court's improper reliance on its rulemaking authority to create a right to a preliminary examination. *Glass*, 464 Mich at 283. The instant challenge, however, does not rely upon the Court's rulemaking authority, so the infirmity found in *Glass* does not apply here. Third, although *Glass* notes that *Duncan* did not rely upon due process principles to

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[18]Although *Green* notes that the judicial inquiry serves the same function as the preliminary examination – to determine probable cause – that is mere *dictum*, and the comment is not germane to the issue of whether the juror has authority to charge in the first instance. *Green*, 322 Mich App at 687.

[19]Upon a finding of probable cause, the judge is to issue an arrest warrant or summons upon the return of which the judge "shall proceed with the case, matter or proceeding in like manner as upon formal complaint." MCL 767.4.

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create the right to a preliminary examination, *Glass*, 464 Mich at 282, that is irrelevant. The challenge here does not rely on due process principles alone. It relies on the *interpretation of the statute* which *Glass*'s holding did not affect, and it relies upon separation of powers principles not even presented or considered. *Duncan* noted the basic proposition, which *Glass* left undisturbed, that the Legislature expressly provided for a preliminary examination under the terms of the one-person judicial inquiry statutory scheme. *Duncan*, 388 Mich at 498-99.[20]

The statutes and the caselaw clearly demonstrate that the juror's function is to investigate, not charge.

C. Even if MCL 767.3 or 767.4 is construed to confer proper authority upon the judicial officer, the indictment must still be dismissed, as it was the product of an investigation that violated the terms of the statute and constitutes a violation of due process

1. The investigation did not comply with the statute

As stated above, the chief judge appointed a colleague as a "one-person grand juror" pursuant to MCL 767.3. ORDER at 3 (Feb 9, 2021). Before initiation of such proceedings, however, there are prescribed statutory requirements.

An investigation may be initiated only upon "the filing of [a] complaint." MCL 767.3. Then, only if the complaint demonstrates "probable cause to suspect [a] crime.

[20]Although whether one is entitled to a preliminary examination is not directly involved here, we address the question to avoid confusion that the prosecution will create. MCR 6.112(B) does, indeed, provide that an "indictment is returned and filed without a preliminary examination," suggesting that the defendant is not entitled to a preliminary examination here. The Code of Criminal Procedure provides that the term "indictment" includes an information, presentment, complaint, warrant or any formal written accusation. MCL 761.1(g). This issue still comes down to interpreting the right the Legislature created in MCL 767.4, which, in fact, provides for a preliminary examination. *Duncan*, 388 Mich at 498-99. The court rule does not control here, because substantive rights provided for by statute control over court rule provisions. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002); *see also Stenzel v Best Buy Co, Inc*, 320 Mich App 262; 906 NW2d 801 (2017).

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. .has been committed within [the] jurisdiction" is a judge authorized to order "that an inquiry be made into the matter relating to such complaint." *Id.* Any order calling for an inquiry "shall be specific to common intent and scope of the inquiry." *Id.* Moreover, in counties such as Genesee "the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court." *Id.*

Here, the complaint has yet to be produced, so there is no ability to evaluate whether there was a proper statutory basis for the investigation, and whether it followed a proper scope. We do know, however, that the appointment of the judicial officer violated the statute. MCL 767.3 expressly requires that such appointments "shall be made in accordance with the rules of such court." Interestingly, other counties have specific rules establishing the method for reviewing and approving applications and appointing judges to conduct investigations. *See, eg,* Ingham County, 30th Judicial Circuit (Rule 6.107); Oakland County, 6th Judicial Circuit (Rule 6.107).[21] Genesee does not. Clearly, something as fundamental as how to evaluate and decide a petition and who to appoint to investigate the matter ought to have a prescribed procedure. Here, there was none.

We also know that the judicial officer was appointed on January 9, 2020, and the investigation was "completed" on December 23, 2020, according to the chief judge or "concluded" on January 9, 2021, according to the judicial officer. In either case, the investigation spanned more than six months. The statute expressly requires that

[21]The rules are attached as a collective exhibit. EXHIBIT D.

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for investigations to exceed that time limit there must be an extension order, MCL 767.4, and none has yet to be produced.

Moreover, the judicial officer acts as a criminal investigator. To do so, there is authority to request members of the bar to assist in the investigation, but proceedings are under the control of the judge, not the Attorney General or prosecuting attorney. *Petition of Hickerson*, 301 Mich 278; 3 NW2d 274 (1942). Here, however, there is no indication that the juror appointed anyone to assist. In fact, the juror incurred no expenses, which only suggests that the Attorney General ran the investigation, not the judicial officer. An accounting from an investigation in another county, for example, clearly reflects that the juror was responsible for the investigation and retained staff to assist in the investigation. *See* EXHIBIT H.

The defense has moved the chief judge for production of the "complaint" or "application" to the court initiating the inquiry, MCL 767.3, the "order" in response to the complaint directing that the inquiry be made and any supplemental orders, *id*, any "specific order" extending the length of the inquiry, MCL 767.4, and any other substantive or procedural orders. The motion, however, has yet to be decided. Depending on the outcome of that motion, there may be additional bases on which to challenge the propriety of the inquiry. Moreover, production of the grand jury materials themselves may reveal irregularities sufficient to support a further challenge.

Apart from being a product of its times, Public Act No. 196 was the result of three infirmities in the criminal justice system that existed more than a century ago.

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Prosecutors did not have the power to subpoena witnesses and put them under oath, they could not compel testimony and punish for contempt, and they had no independent authority to grant immunity to secure needed testimony. Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY 20 (Michigan State Board of Agriculture 1957). Today, that is no longer the case. Prosecutors now have the benefit of the investigative subpoena statute, MCL 767.1, *et seq*., which empowers them to compel testimony, seek contempt sanctions and authorize immunity.

Here, the Attorney General did not petition for a judicial inquiry for any proper investigative purpose. It could have used the methods of the OSC, which included interviews and investigative subpoenas, but it did not. Use of the judicial inquiry as a tactic rather than a tool is best illustrated in the results obtained. Of all of the fact witnesses pertaining to Mr. Lyon identified to date, *none* was new to the case. In fact, 10 of them testified at preliminary examinations in 2017 and 2018, and for all of the others the OSC had produced either witness statements or investigative subpoena transcripts. Many were state employees whose emails and other information was previously disclosed. Some were people who agreed to speak with the defense. Some even had made very public statements. The exhibits were all part of the original database. This was not a new investigation. It was an old investigation re-packaged in the hope of avoiding a preliminary examination, and it hardly required compulsory process or secrecy.

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2. The manner in which the investigation was conducted violated due process

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[n]o person shall. . .be deprived of life, liberty, or property without due process of law. US CONST AMEND V. Michigan provides the same guarantee in its Constitution's Declaration of Rights: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." MICH CONST 1963 art 1, § 17. The manner in which the judicial inquiry statute was used here violates these guarantees and requires dismissal of the Grand Jury Felony Indictment.

Starting with the initiation of the inquiry through the return of "indictments," the one-person grand judicial inquiry statute was violated. The judicial officer and those who participated in the proceedings were obligated to follow the statutory requirements. Even administrative agencies, for example, that do not follow their own procedural rules violate one's due process rights. *Abbott v Howard*, 182 Mich App 243; 451 NW2d 597 (1990) (voiding worker's compensation award under due process principles under Michigan and United States constitutions when agency did not follow its own procedural rules); *see also United States v Caceres*, 440 US 741, 751 n14 (1979) ("It does not necessarily follow. . .as a matter of logic or law" that an agency has no duty to follow its own rules); *Morton v Ruiz*, 415 US 199, 235 (1974)("Where the rights of individuals are affected, it is incumbent upon agencies to follow their

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own procedures."). It only stands to reason that the statutory violations here rise to the level of a due process violation.

We recognize that there are limits to the protections due process provides. For example, in *Barclay v Florida*, 463 US 939 (1983), the Supreme Court upheld a death sentence even though it had been imposed in violation of state law. A "'mere error of state law' is not a denial of due process." 463 US 954 (citing *Gryger v Burke*, 334 US 728 (1948)). A "state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." *Levine v Torvik*, 986 F2d 1506, 1515 (6th Cir 1993), *overruled in part on other grounds*, *Thompson v Keohane*, 516 US 99 (1995). Here, however, the due process concerns are not mere violations of rules. They are structural and based on a charging scheme that violates separation of powers.

From the record available to date, we know several things. Even though the statute specifically requires the court to have rules, it did not. The "order [directing an inquiry] and the designation of the judge" shall be pursuant to local rules. MCL 767.3. As a consequence, there was no process or standard to consider whatever petition that was made. There was no process or standard to determine whether the application was sufficient to initiate the process.[22] There was no process or standard for selecting the judicial officer to conduct the inquiry. We also know that over the course of a year, about 45 witnesses were called and 1,400 exhibits were offered. EXHIBIT C. Yet, the judicial officer incurred no expenses. EXHIBIT F. Contrary to the

[22]Again, the application and any court orders enter in connection with the investigation have yet to be produced.

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intent and requirements of the statute, this was the Attorney General's presentation and argument to a judicial officer, not an independent investigation conducted by a judicial officer. *See Petition of Hickerson*, 301 Mich at 282 (citing *In re Petition for Investigation of Recount*, 270 Mich 328; 258 NW 776 (1935)). Simply put, it was a preliminary examination without the defendant. What is missing is a probable cause determination by a neutral and detached magistrate or body, because the investigating judicial officer cannot perform that function under the literal terms of the statute, MCL 767.4 ("shall be disqualified from acting as the examining magistrate") or the requirements of due process.

In addition to these apparent infirmities, further examination of the grand jury proceedings themselves may very well reveal other irregularities, just adding to the due process argument here.

The judicial inquiry statute has been subject to due process criticism over time as noted in *Oliver* and *Murchison*, particularly in Justice Rutledge's observations in *Oliver*. *Colacasides* considered a due process challenge, which took into account those criticisms. In finding no constitutional issue, the court contrasted those many criticisms with the many amendments to the statute. For example, it noted that the statute now affords witnesses more rights and limits the judicial officer's powers. It noted that the judicial officer could not act as the examining magistrate or hear a motion to dismiss or quash and that that the judicial officer has reduced contempt powers and that restrictions were put in place to limit the scope of inquiries. 379 Mich 98-99. Those many amendments, however, do not address the fundamental

concerns presented here. Moreover, as the court noted five years later in *Bellanca*, the statute's constitutionality is an open question.

The judicial inquiry statute as used here violated federal and state constitutional guarantees, and the charge that the investigation under which it was conducted produced must be dismissed.

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IV. Conclusion

For the above reasons, the defense respectfully submits that the Grand Jury Felony Indictment must be dismissed in its entirety.

Respectfully Submitted,

Dated: July 2, 2021

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Pl's Ex F- Lyon COA - App for Leave

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

NICOLAS LYON,

Defendant-Appellant.

FILED UNDER AO 2019-6

Court of Appeals
No. _____

7th Judicial Circuit
No. 21-47378-FH

APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED AND RELIEF SOUGHT

Defendant-Appellant Nicolas Lyon, former director of the Michigan Department of Health & Human Services (MDHHS), seeks leave to appeal from the Genesee County Circuit Court's February 17, 2021 Order denying his motion to dismiss. EXHIBIT A. The motion urged dismissal on the basis that (1) the prosecutor's use of the so-called "one-person grand jury" process violated the Michigan Constitution because the process authorizes a single person to both investigate and charge an individual with a crime, and (2) the process used by the Attorney General and the judicial officer who conducted the proceeding violated both the judicial inquiry statute and Due Process.

The circuit court register of actions is attached. EXHIBIT B.

The circuit court heard the parties on the motion on August 10, 2021, and a copy of the transcript of that hearing is attached. EXHIBIT C.

Director Lyon respectfully requests that this Court grant the application, order full merits briefing and oral argument, and reverse the circuit court's decision, dismissing the case.

STATEMENT OF APPELLATE JURISDICTION

The circuit court entered its written opinion and order on February 17, 2022. Director Lyon filed this application for leave to appeal on March 9, 2022. This Court has jurisdiction to consider the application pursuant to MCR 7.203(B)(1) and MCR 7.205(A)(1).

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PENDING APPLICATIONS FOR LEAVE TO APPEAL IN RELATED AND OTHER CASES

At the same time the Attorney General filed charges against Director Lyon, she charged others whose cases were deemed related as arising out of circumstances involved with the switch in the municipal water supply in Flint, Michigan. Some of those defendants filed motions in circuit court that are now the subject of applications for leave to appeal in this Court and the Michigan Supreme Court.

In an order entered June 16, 2021, the trial court denied motions of related defendants to remand for a preliminary examination pursuant to the judicial inquiry statute. On August 25, 2021, this Court denied leave to appeal, and pending before the Michigan Supreme Court are applications for leave to appeal, which are:

People v Gerald Ambrose
No. 357757 (Mich Ct App); No. 16373 (Mich Sup Ct)
(reply filed Dec 3, 2021)

People v Richard Louis Baird
No. 357715 (Mich Ct App); No.163672 (Mich Sup Ct)
(reply filed Dec 6, 2021)

People v Darnell Earley
No. 357750 (Mich Ct App); No. 163665 (Mich Sup Ct)
(reply filed Dec 6, 2021)

People v Nancy Peeler
No. 357754 (Mich Ct App); No. 163667 (Mich Sup Ct)
(reply filed Dec 6, 2021)

In an order entered November 19, 2021, the trial court granted in part Director Lyon's motion for a protective order and directed that the Attorney General cease review and production of discovery materials and implement a taint team to review seized materials that included confidential and attorney-client information. The Attorney General moved for reconsideration, and on January 7, 2022, the circuit court denied that motion. On January 28, 2022, the Attorney General sought leave to appeal to this Court alleging error. That matter is docketed as follows:

People v Nicolas Lyon
No. 360124 (Mich Ct App)
(answer filed Feb 18, 2022)

Issues related to the ones raised in this application are also pending in recent applications to this Court and the Michigan Supreme Court from

two unrelated cases filed in the 7th Judicial Circuit, Genesee County. Those cases challenge the denial of motions filed in circuit court seeking a remand for a preliminary examination, similar to the challenges in the pending applications in *Baird*, *Earley*, *Peeler*, and *Ambrose*, referenced above. They are docketed as follows:

People v Kevin Lamont Tyler
No. 359006 (Mich Ct App); No. 163979 (Mich Sup Ct)
(answer filed Feb 22, 2022)

People v Nickolas Patrick Hipps
No. 360053 (Mich Ct App)
(answer filed Feb 16, 2022)

The issues presented in the instant appeal are different than any of the issues presented in these cases.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution of the State of Michigan of 1963, regarding general government provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Article VI, Section 2, of the Constitution of the State of Michigan of 1963, regarding the judicial branch provides:

> Justices of the supreme court, judges of the court of appeals, circuit judges and other judges as provided by law shall be conservators of the peace within their respective jurisdictions.

MCL 767.3, entitled in part "proceedings before trial; inquiry, order, conducting," provides:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

MCL 767.4, entitled in part "proceedings before trial; apprehension of suspect. . .period of inquiry," provides in pertinent part:

> If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed,

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the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 [MCL 767.3] shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 [MCL 767.5], except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. * * * Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry otherwise than by issuing or executing processes prior to the indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court. * * *

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the judicial inquiry statute violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963 art III, § 2, by authorizing a single member of the judiciary to simultaneously investigate and charge a citizen with a criminal offense.

Defendant-Appellant Answers: Yes
Prosecutor-Appellee Answers: No

2. Whether the judicial inquiry statute confers charging authority upon a member of the judiciary when the statute is silent as to such authority and specifically requires that the inquiry proceed "in like manner as upon formal complaint."

Defendant-Appellant Answers: No
Prosecutor-Appellee Answers: Yes

3. Whether the manner in which the Attorney General and the judicial officer conducted the judicial inquiry violated due process where the circuit court granted the application and assigned the judicial officer contrary to statute and the judicial officer administered the wrong oath to those participating in the inquiry, allowed extraneous participants, and did not observe other specific statutorily-required procedures.

Defendant-Appellant Answers: Yes
Prosecutor-Appellee Answers: No

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INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

This interlocutory appeal involves what is popularly – and erroneously – called the "one-person grand jury" statute, a criminal investigative provision unique to Michigan. It raises jurisprudentially significant, troublesome, and recurring legal questions regarding the use of the unique, statutorily prescribed process. Indeed, half a century ago, the Michigan Supreme Court warned that the "constitutionality of a system whereby a Judge accuses a person of a crime may not withstand our re-examination." *People v Bellanca*, 386 Mich 708, 715; 194 NW2d 863 (1972). Now is the time for that re-examination.

The judicial inquiry statute's plain language does not authorize a judicial officer to do what was done here: file a criminal charge and simultaneously declare there to be probable cause sufficient to proceed to trial. If the statute were construed to provide such authority – as the circuit court held below – it would violate Michigan's constitutional requirement of separation of powers, because such a construction confers upon the judiciary functions exclusively reserved for the executive, namely charging. The judicial officer's sole authority here was to investigate, not charge.

Moreover, any criminal charges must be the product of an investigation conducted by following statutory requirements. That did not happen here. The Solicitor General led an investigation of her choosing that had no statutory basis. For each of these independent reasons, the indictment must be dismissed.

There are multiple reasons why this application warrants this Court's immediate review:

To begin, this application presents an issue of first impression. Neither this Court nor the Michigan Supreme Court has addressed the constitutionality or authority of a one-person grand juror to charge a criminal offense.

Here, the circuit court allowed the prosecutor to rewrite the terms of the judicial inquiry statute, allowing the grand juror to play the roles of both investigator and prosecutor. That ruling presents a legal principle of major significance to the state's jurisprudence and runs directly into the Michigan Constitution's separation of powers, which prohibits one person from assuming both judicial and executive roles.

In addition, the significance of the validity of the one-person grand juror process is not limited solely to Director Lyon's case, or even all the many cases involving the Flint water crisis. Having seen how the judicial inquiry process can be manipulated to skirt a proper charge followed by a preliminary examination, the Genesee County prosecutor has gone whole hog, invoking the process in more than 60 recently filed criminal cases that are unrelated to the Flint water prosecutions. The constitutionality of the process is already at issue in dozens of cases and, absent this Court's immediate intervention, will soon be a cloud over hundreds of additional matters.

What's more, this Court's immediate resolution of the process's constitutional validity will result in a tremendous saving of judicial, government, and defendant resources. If dozens of cases are prosecuted until completion, and this Court then rules the judicial inquiry process unconstitutional, every one of those cases will need to be started from scratch and litigated a second time, with thorny limitations-period questions to boot. Also, if the Court were to deny leave here, then the process will continue to be abused, causing continued uncertainty and relieving prosecutors of the burden of litigating preliminary examinations and denying defendants the right to challenge the adequacy of proofs before trial.

Finally, the circuit court's resolution of the issues presented was clearly erroneous and will cause material injustice to Director Lyon. He was and is entitled to a process that does not blur the executive and judicial roles, a process that also provides the opportunity for a preliminary examination. As the first prosecution in this case showed – one where the prosecutor was required to conduct a preliminary examination before ultimately dismissing the case without prejudice – Director Lyon can punch irreparable legal holes in the prosecution's theories of the case when given a chance to do so in a fair and impartial legal proceeding. The prosecution should not be allowed to use unconstitutional gamesmanship – including an *ex parte* investigatory and charging process where the prosecutor presents no exculpatory evidence to a purportedly impartial judicial officer – to advance an indictment on weak evidence and even weaker legal theories.

For all these reasons, and those stated in more detail below, the Court should grant the application for leave to appeal forthwith.

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STATEMENT OF PROCEEDINGS

On December 27, 2019, the Solicitor General applied to the 7th Judicial Circuit, Genesee County, requesting that it convene a "one-person grand jury" to investigate "crimes relating to the 'Flint Water Crisis.'" EXHIBIT D (App at 1). The court granted the application, and its order initiated proceedings to commence retroactively – to January 1, 2020. EXHIBIT E (Order ¶ 2 at 2). The order expressly provided, as required by statute, that proceedings "shall continue no longer than six (6) months, unless extended by the specific order of this Court or this Court's successor for an additional period not to exceed six (6) months." Exhibit E (Order ¶ 7, at 3).

In an order entered June 4, 2020, the judicial officer purported to extend the inquiry under the statute to January 9, 2021, which was longer than allowed by statute. EXHIBIT F. Moreover, not until January 13, 2021 – again outside the statutory time limits – were charges filed against Director Lyon in a document entitled, "Grand Jury Felony Indictment," ostensibly executed on January 8, 2021, alleging nine counts of manslaughter, MCL 750.321, and a single misdemeanor count of misconduct in office, MCL 750.478. EXHIBIT G.

On July 2, 2021, Director Lyon filed a motion to dismiss on the basis that use of the judicial inquiry process here violated Michigan's constitutional requirement of separation of powers and that the process used by the Attorney General and the judicial officer violated the judicial inquiry statute and due process. After supplemental briefing and oral argument, on February 17, 2022, the trial court denied the motion in a written opinion and order. EXHIBIT A.

It is from this order Director Lyon now seeks leave to appeal.

The trial court held that MCL 767.3 and 767.4 give the judicial officer authority to issue an indictment, concluding that indictments issued following a judicial inquiry are the same as indictments returned by citizen grand juries and should be treated the same. In particular, it reasoned that simply because citizen grand juries are authorized to issue indictments, and MCL 767.4 happens to mention the word "indictment" twice, it likewise provides authority for the judicial officer to issue indictments upon a finding of probable cause. EXHIBIT A (Order at 3).

The circuit court also relied on this Court's decision in *People v Green*, 322 Mich App 676, 685; 913 NW2d 385 (2018), which addressed

whether the right to counsel attaches at a judicial inquiry proceeding. There, this Court parenthetically noted that under MCL 767.4 "the trial court 'shall proceed with the case' after the one-person grand jury returns an indictment." In the circuit court's estimation, that parenthetical from *Green* means that MCL 767.4 authorizes the judicial officer conducting an inquiry to issue a criminal charge in the form of an indictment.

The circuit court further held that it does not violate separation of powers to have a judicial officer issue criminal charges, a role typically reserved for the executive branch. It said that judicial officers are not performing an executive function by issuing indictments because the legislature authorized the judicial officer to do so in MCL 767.3 and 767.4. And it reasoned that even if the judicial officer were performing an executive function by charging, it would not violate the separation of powers because the judicial inquiry statutes do not allocate the "whole power" of charging to the judiciary.

Finally, the court below held that none of the many irregularities in how the judicial inquiry was used in this case – or all of them taken together – amounts to a due process violation. EXHIBIT A (Order at 10-11).

As part of the litigation in the trial court, Director Lyon moved for a protective order for reasons more fully described below. In an order entered November 19, 2021, the trial court granted that motion in part. It directed that the Attorney General cease review and production of discovery materials while implementing a taint team to review seized materials that included confidential and attorney-client information. The Attorney General has sought leave to appeal to this Court alleging error, which application is pending. *People v Nicolas Lyon*, No. 360124 (Mich Ct App).

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STATEMENT OF FACTS

This case is the second prosecution of Director Lyon and is the product of three separate investigations into Flint's switch in its municipal water supply in 2014. The first investigation began in 2016, took a year-and-a-half and resulted in charges being voluntarily dismissed in 2019 after a year-long preliminary examination. The second was initiated by the newly elected Attorney General and took another year without charges being filed. The third was a judicial inquiry, initiated at the request of the Solicitor General in 2020, which took yet another year, and produced the nine-count indictment which is the subject of this appeal.

The issues presented in this appeal require an understanding of the history of these investigations, which is detailed below. Above all, though, they require an understanding of Director Lyon's role as head of a 14,000-person agency with a $25 billion budget. He is not a physician or an epidemiologist. He necessarily relied on the expertise of a large professional staff who were tasked with working with the local health department and others to analyze data from the outbreak. Moreover, these were critical times for MDHHS. On September 29, 2014, Nick Lyon became director of the Michigan Department of Community Health (MDCH). Less than six months later – and just weeks after he was notified about a Legionnaires uptick in Genesee County – the Governor's office announced the merger of MDCH with the Department of Human Services to become MDHHS. Director Lyon was the new agency's first director, and his initial responsibilities during 2015 consisted of merging Michigan's two largest agencies while supervising many matters that were critical to Michigan's public health.

I. *People v Nicolas Leonard Lyon*, No. 18-43638-FH

A. The first investigation

More than six years ago, on January 15, 2016, the then-Attorney General appointed a Special Assistant Attorney General, Todd F. Flood, to investigate the 2014 switch in the municipal water supply in Flint. Mr. Flood established the Office of Special Counsel (OSC), hiring a legal and investigative staff to perform prosecutorial functions. Special Counsel was needed because the Attorney General was representing many state officials, including Director Lyon, in various lawsuits that involved the switch in Flint's municipal water supply.

For a year-and-a-half, the OSC conducted its investigation. It interviewed witnesses, sometimes using investigative subpoenas under MCL 767A.1, *et seq*., executed search warrants, subpoenaed documents, and collaborated with other law enforcements agencies, including the Genesee County Prosecuting Attorney.

A critical part of its investigation was obtaining voluminous records from various state agencies, including MDHHS, the Office of the Governor, the Michigan Department of Environmental Quality (MDEQ), and the Department of Treasury. (This effort would be greatly impacted years later by the current prosecution team, which is the subject of the Attorney General's pending leave application.) To comply with these demands, state agencies hired outside counsel. Assistant Attorneys General (AAGs) from the civil side who also represented the various agencies coordinated the response to the subpoenas and discovery demands. They, in turn, hired an eDiscovery vendor, KLDiscovery, to assist with the document collection, review, and production. The parties worked cooperatively and agreed on search terms and a production schedule.

A significant challenge in this process was protecting from disclosure attorney-client communications and attorney work product, especially since several government employees were targets of the OSC investigation and defendants in pending civil actions represented by the AAGs. Accordingly, a privilege review process was established so that the agencies had the opportunity to review potentially privileged material prior to production. This ensured that the OSC investigative processes would not be tainted by the receipt and use of privileged information. As part of this process, the agencies provided extensive privilege logs.

MDHHS was represented by its in-house counsel and the civil AAGs, and it retained outside counsel to handle matters related to the OSC criminal investigation. Director Lyon was represented by the AAGs in civil litigation, and he had separate counsel for the criminal investigation. Because there was significant overlap in issues, the Department of Attorney General on behalf of Director Lyon and MDHHS entered into a common-interest agreement along with others so they could freely pursue their common interests and protect the privilege, work product, and confidentiality attached to shared communications and documents. Director Lyon naturally relied upon

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the common-interest agreement to protect information shared with parties to the agreement and their counsel.

The OSC was aggressive in its efforts to obtain records, and it was not without criticism. In fact, the OSC prevailed on the circuit court to enter some *ex parte* protective orders – in collaboration with McLaren Hospital and the Genesee County Prosecuting Attorney – to conceal vital information from MDHHS inhibiting its public health investigation. When MDHSS learned of the orders, it sought a writ of superintending control, and this Court summarily vacated the protective orders in 2016. *See Dep't of Health & Human Services v Genesee Circuit Judge*, 318 Mich App 395; 899 NW2d 57 (2016).

B. The original charges

The OSC charged 15 people with various offenses, including employees of MDHHS, MDEQ, and the City of Flint, together with two emergency city managers.[1] On June 14, 2017, Director Lyon was charged in the 67th District Court, Genesee County, in a complaint alleging manslaughter, MCL 750.321, and misconduct in office, MCL 750.505. Following a preliminary examination that took 26 days spanning 11 months, Director Lyon was bound over to circuit court on August 20, 2018.[2]

On bindover, the case was assigned to Hon. Joseph J. Farah. Within three weeks, on September 10, 2018, Director Lyon filed a motion to quash the felony charges and a motion to dismiss a misdemeanor count of willful neglect of duty, MCL 750.478, that had been added.[3] The matter was fully briefed by the parties and set for oral argument in early February 2019.[4]

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[1]Charges against Michael Glasgow of Flint were dismissed early on, and six people – Adam Rosenthal, Michael Prysby, Stephen Busch and Liane Shekter-Smith of MDEQ, Corinne Miller of MDHHS, and Daugherty Johnson of the Flint Department of Public Works – all eventually pled guilty to misdemeanors.

[2]Eden Wells (MDHHS) was also bound over to circuit court, and her case, No. 18-44241-FH, was assigned to Hon. Jospeh J. Farah. Gerald Ambrose, an emergency manager, waived his preliminary examination and was bound over to circuit court. The cases against Patrick Cook (MDEQ), Howard Croft (Flint), Darnell Earley (EM), Nancy Peeler (MDHHS), and Robert Scott (MDHHS) all remained in district court for completion of preliminary examinations.

[3]The OSC filed its Felony Information on September 26, 2018. EXHIBIT H.

[4]Dr. Wells also filed a motion to quash on February 25, 2019, which was fully briefed by the parties and awaiting a date for oral argument at the time of dismissal.

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While handling the dispositive motions, Judge Farah became deeply knowledgeable about the underlying facts and the prosecution's novel legal theories. He read nearly 3,000 pages of preliminary examination transcript, reviewed over 200 exhibits, and studied hundreds of pages of briefing by the parties and amici. Over two full days of oral argument, he posed tough questions the prosecution was unable to answer about the viability of its legal theories, especially as to the most serious charges of manslaughter.[5] At the conclusion of the second day of argument on February 6, 2019, Judge Farah announced that he planned to have a decision within 90 days. It's fair to say that, based on his comments, Judge Farah was prepared to issue a decision that kneecapped the prosecution's core theories.

C. The prosecution stalls to delay a ruling

A new Attorney General was sworn in on January 1, 2019. Within days, she appointed the Solicitor General to handle and supervise the pending prosecutions initiated by the OSC. "New Solicitor General Hammoud to Lead Flint Criminal Cases," ATTORNEY GENERAL PRESS RELEASE (Jan 15, 2019). After the Solicitor General observed the prosecution's disastrous showing at the first oral argument, she sought a six-month stay claiming she just "learned of the existence of millions of pages of documents, as well as phone extractions and other materials

[5]Among the many questions the trial court posed to the prosecution were the following:

> Because Corinne Miller by her testimony. . .quotes the director as saying he wanted to be kept informed, but she doesn't remember expressing any concern or facial expressions. . . . Anywhere in there does she say anything about, you know, I'm just going to use it in common parlance – Nick, get on this, put out a public notice, this is serious? (pp 12-13)
>
> What should the notice have said that would have gone out in January of '15? . .. Be on the lookout for what? Guard against what? Stay away from what? Don't drink Flint water? Don't shower with Flint water? What should it have said? This isn't a drinking illness. (p 19)
>
> Is there any authority that you have found where [MCL] 333.2221 has been the authority for charging somebody with manslaughter? (p 22)
>
> He did say in the January 28th meeting as reported keep me posted on this and try to get other records from McLaren. Isn't that enough? (p 58)
>
> We've established what their jobs are. We've established their hierarchy or roles. We've established that they were involved in the conversation. Now, let's get to this question. What did they say? What did they provide, emails, text messages, whatever the case may be? Other than the epi curve, what did they impart. . .to Director Lyon? (pp 62-63).

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stored on hard drives recovered in a State-owned facility's basement" that it said had not been previously turned over by various state departments. EXHIBIT I (Plaintiff's Request for Stay at 2-3).

But in an extraordinary turn of events, the Attorney General's office, through another arm of the office, intervened to advise the circuit court that the Solicitor General's claims were untrue.[6] EXHIBIT J (Department of Attorney General's Brief Explaining Its Intervention in this Case at 1).

At a hearing on May 3, 2019, the circuit court denied the Solicitor General's stay request and advised the parties that it would rule on the pending motion to quash on June 14, 2019. It noted that the Solicitor General would effectively have another six weeks to review the so-called previously undisclosed materials and that it should roll up its sleeves, look through the material and advise the court if it found something concrete related to the case.[7]

D. The prosecution dismisses to avoid a bad ruling

The Solicitor General brought nothing additional to the circuit court's attention during that six-week accommodation. Instead, the day before the court was scheduled to rule on the motion to quash, the

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[6]The challenge to the Solicitor General's specious allegations was dramatic and emphatic:

> The People alleged that the Department [Attorney General's office] took direction from Director Lyon's defense attorney on what documents the Department's clients should produce in response to the Office of Special Counsel's (OSC) investigative subpoenas. *That is not true.*
>
> The People allege that the Department concealed millions of responsive documents from them in a basement. *That is not true.*
>
> The People allege that the Department failed to respond to the investigative subpoenas issued by the OSC. *That is not true.*
>
> The People allege that the Department represented that phone data did not exist when it did exist. *That is not true.*
>
> The People allege that the Department was complicit in an alleged destruction of evidence. *That is not true.*
>
> The People allege that the Department produced millions of pages of documents in a non-searchable format. *That is not true.*

[7]In the meantime, on May 8, 2019, the court denied the defendant's motion to dismiss the misdemeanor count, and the defendant filed an application for leave to appeal with the Court of Appeals. The application was then voluntarily dismissed following entry of the motion for *nolle prosequi*.

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Solicitor General filed a motion for *nolle prosequi* terminating the prosecution against Director Lyon and others. By voluntarily dismissing on June 13, 2019, the prosecution ducked a potentially disastrous outcome on the felony charges, a decision that would have issued the very next day.

II. *People v Nicolas Lyon*, No. 20-47378-FH

A. The second investigation

Having essentially lost on the evidence and the law in the first round of charges, the Solicitor General took a new tactic designed to circumvent another preliminary examination. For almost a year, the prosecution reviewed the results of the OSC investigation, issued another round of subpoenas for testimony and documents, interviewed witnesses – some new, some who had already testified or been interviewed – and executed search warrants.

Central to this second investigation – and the source of continuing controversy – were search warrants that were executed on the Michigan Department of Attorney General, its eDiscovery vendor, KDL Discovery, and the Department of Technology, Management & Budget (DTMB). The warrants, issued in May 2019, sought computers, cellular telephones and other devices, and workspaces. The breadth of the warrants resulted in the Solicitor General seizing all kinds of attorney-client communications and attorney work product, particularly since the parties relied on the common-interest agreement it had with the civil AAGs representing Director Lyon and others. Among the material it seized was the very material that counsel for the parties had diligently sought to protect years earlier based on privilege and confidentiality, creating privilege logs.

When counsel for Director Lyon learned of the warrants' execution, he demanded to know what protections were in place to safeguard confidential information. The Solicitor General ignored this request and did nothing.[8]

[8]This transgression led the circuit court to grant Director Lyon's motion for a protective order barring the review and dissemination of any further discovery until the Solicitor General establishes a taint team, which the Solicitor General has appealed.

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B. The third investigation

After spending nearly another year investigating, on December 27, 2019, the Solicitor General petitioned the 7th Judicial Circuit, Genesee County, to conduct a "one-person grand jury" investigation. The Solicitor General did so with the apparent intent to deprive the defendants of a preliminary examination.[9] Otherwise, there really was no need for another investigation, much less a secret one. Most of the witnesses who testified during the judicial inquiry had testified previously in the several preliminary examinations that were held in 2017, had provided testimony pursuant to investigative subpoena, or had voluntarily been interviewed, sometimes on multiple occasions. In fact, many who appeared in the judicial inquiry were public figures whose information was well known and well publicized, and some were academics who had published on the pertinent subjects. The same was true for the exhibits that were submitted during the year-long judicial inquiry – they were the same documents and evidence that had already been received in the preliminary examinations and produced in discovery. So even though there was no need for this secret proceeding, the Solicitor General could use it without defendants being able to cross-examine witnesses and introduce exculpatory evidence as they would at a preliminary examination.

1. The appointment of the judicial officer

The Solicitor General's December 27, 2019, application requested that the circuit court "convene a one-person grand jury pursuant to MCL 767.3 for the purposes of investigating crimes relating to the 'Flint Water Crisis,' including conduct before, during, and after the city of Flint's ('City') April 2014 switch of its water source from the Detroit Water and Sewerage Department ('DWSD')." EXHIBIT D (App at 1).

On January 9, 2020, the chief judge, Hon. Duncan M. Beagle, granted the application and issued an order that Hon. David J. Newblatt "sit as a one-person grand jury in the above captioned matter." EXHIBIT E (Order ¶ 1 at 1). Importantly, the order authorized commencement

[9]EXHIBIT K ("New Flint water criminal cases will move faster than former court proceedings: All nine defendants will go straight to trial under grand jury process," ABC 12 NEWS, https://www.abc12.com/news/flint-water-emergency/new-flint -water-criminal-cases-will-move-faster-than-former-court-proceedings/article_367ac5 ce-999e-5023-91e5-ad269db2505b.html. Whether there is a right to a preliminary examination following a judicial inquiry charge was the subject of a motion in the trial court and a leave application in the Court of Appeals. Related defendants have pending in the Michigan Supreme Court an application for leave to appeal.

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of proceedings retroactively – to January 1, 2020 – instructing that the "appointed judge shall convene one-person grand jury proceedings on January 1, 2020, in Genesee County and continue in session from time to time as directed by the Court. . .." *Id* (Order ¶ 2 at 2).

The order expressly provided proceedings "shall continue no longer than six (6) months, unless extended by the specific order of this Court or this Court's successor for an additional period not to exceed six (6) months." Exhibit E (Order ¶ 7, at 3). This provision was consistent with express statutory requirements which provide that: "[n]o inquiry or proceeding under this chapter shall continue longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months." MCL 767.4. In other words, the order specifically provided that absent an extension being granted by Judge Beagle (or his successor), the proceeding would conclude June 30, 2020, but Judge Beagle (or his successor) could extend the judicial inquiry by six-months, to December 31, 2020.

The order also authorized the judicial officer to compel persons to appear and answer questions pursuant to summons or subpoena, MCL 767.3, and comply with secrecy and administrative provisions applicable to judicial inquiries, MCL 767.4, 767.4a, 767.5, 767.5a, 767.6, 767.6a, 767.6b. Curiously, the order also conferred upon the judicial officer statutory authority applicable only to *citizens* grand jury proceedings. For example, citing MCL 767.20, it authorized the judicial officer to "request the Solicitor General of the State of Michigan, or her designees, to examine witnesses in the presence of the grand jury, and advise the grand jury on legal matters," or, citing MCL 767.22, "alternatively, entertain a request from the Solicitor General of the State of Michigan for her, or her designees, to appear before the grand jury to offer information regarding any matter cognizable by the grand jury." EXHIBIT E (Order ¶ 4(b) at 3).

The process used to convene the judicial inquiry deviated substantially from the statutory requirements. The defense continues to litigate requests for production of information about the judicial inquiry, so there is much yet to learn. Given the information provided to date, however, it is evident that the process used to investigate and charge Director Lyon was rife with irregularities that did not conform to the requirements of the statute. In fact, it appears that the Solicitor General made up her own investigative method, which has no statutory authority.

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As more fully explained below in the Argument, MCL 767.3 has specific requirements for establishing a judicial inquiry. It expressly requires that orders regarding applications and appointments of judicial officers "shall be made in accordance with the rules of such court," yet the 7th Judicial Circuit has no rules on the subject. Once the inquiry was convened, the judicial officer administered an oath to over 40 people – AAGs, other judges, court staff, and the sheriff. In particular, they were all administered an oath

> to *diligently inquire* into and make true presentment in *seeking indictment* of all such matters and things as shall be given you in charge or otherwise come to your knowledge, *touching your grand jury service*.

TRANSCRIPT at 6-11 (Jan 23, 2020) (emphasis supplied).[10] That oath – which is actually the citizens' grand jury oath – required those who took it to investigate and *charge* people with crimes, which was not their responsibility. *See* MCL 767.9. The judicial inquiry statute makes no provision for advocates. The judicial officer is to be the investigator who may have assistants, but he is not the charging official required to take an oath to indict.

2. The judicial inquiry proceedings

The investigation continued for several months and was extended. In a June 4, 2020, order, the judicial officer – not the chief judge – purportedly modified the chief judge's order, stating that "the One-Person Grand Jury appointed by and through this court in an Order dated January 9, 2020, due to expire on July 9, 2020, is hereby extended for six (6) months to January 9, 2021. All other orders in the Order dated January 9, 2020, remain in effect." EXHIBIT F. That order was invalid twice over. First, it was signed by an individual who lacked authority to extend his own authority. Second, it extended the proceeding well after the one-year period that the governing statute allowed (January 1, 2021).

The judicial inquiry took more than a year to complete. Judge Newblatt purportedly signed a "Grand Jury Felony Indictment" on January 8, 2021, charging Defendant-Appellant Lyon with nine counts of involuntary manslaughter, MCL 750.321, and one count of willful neglect of duty in violation of MCL 750.478. EXHIBIT G. There were no

[10]Attached as a collective exhibit are excerpts from the proceedings of the judicial inquiry. EXHIBIT L.

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proceedings on that date and there is no record of what transpired. The register of actions does not reflect that there was any business that day, nor does it reflect the signing or filing of the indictment. The indictment also was not countersigned by the Solicitor General, and it does not list or endorse any witnesses.

The Attorney General retained the indictment and filed it on January 13, 2021. Filed on the same day were "Grand Jury Felony Indictments" against six other defendants and misdemeanor "Grand Jury Indictments" against two others.[11] All of the cases had also been given a "confidential/non-public file" designation, No. 2020-113791-PZ. Those charged with felonies were arraigned before Hon. Elizabeth A. Kelly, circuit judge, and those charged with misdemeanors were arraigned before different district judges to whom their cases had been assigned.

The judicial inquiry statute requires that the judicial officer account for the expenses incurred in the investigation within 90 days in a public filing. MCL 767.6b. Only after inquiry by counsel, the judicial officer filed his accounting which reflects that the court somehow spent *no money* on the investigation. EXHIBIT M. Obviously, the Attorney General did.

The record also reflects instances in which the AAG's communicated with the judicial officer "off the record." As discussed more fully below in the Argument, there were additional irregularities where the inquiry simply did not conform to the statutory requirements. Instead, the judicial inquiry took on a hybrid form – the Solicitor General blended the statutes relating to the judicial inquiry with statutes relating to the citizens grand juries to come up with something entirely new.

C. The new and current charges

The "Grand Jury Felony Indictment" alleges nine counts of manslaughter charging that Director Lyon caused the deaths "by the grossly negligent failure" to "protect the health of the citizens of Michigan and/or by the grossly negligent performance of that duty in

[11]The felony cases are *People v Jarrod Peter Agen,* No. 21-047372-FH, *People v Gerald Ambrose*, Nos. 21-047373-FH, 21-047374-FH, *People v Richard Baird*, No. 21-047375-FH, *People v Darnell Earley*, Nos. 21-047376-FH, 21-047377-FH, *People v Nancy Peeler*, No. 21-047379-FH, and *People v Eden Wells,* No. 21-047380-FH. The misdemeanor cases are *People v Richard Snyder*, No. 21G-0046-SM and *People v Howard Croft,* No. 21G-0047-SM.

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accordance with the public health case." EXHIBIT G. The remaining count, a misdemeanor, alleges that Director Lyon "did willfully neglect his mandatory legal duty to protect the health of the citizens of Michigan under the Michigan Public Health Code." These charges are indistinguishable from those the prosecution filed under the OSC.

Although seven of the nine defendants had been previously charged with similar offenses in cases that the Attorney General voluntarily dismissed in 2019 (apparently to avoid an unfavorable ruling), all current cases involve charges that are the product of the "one-person grand jury" investigation. As stated above, the Attorney General has openly acknowledged that they chose this unique investigative process to avoid a preliminary examination. EXHIBIT K.

III. Discovery Regarding the Judicial Inquiry

Discovery issues have been addressed in two forums – before Chief Judge Beagle regarding the grand jury record and before Judge Kelly regarding the criminal case.

For more than a year, the parties have litigated issues involving production of the record of the judicial inquiry, and it is still ongoing. In January 2020, pursuant to MCR 6.107, Director Lyon filed a motion before the chief judge requesting transcripts of proceedings and exhibits, together with all applications and orders. Transcripts for 31 days of proceedings involving 48 witnesses were produced, together with the Solicitor General's application under MCL 767.3, the order granting the application, and an order purporting to extend the proceeding pursuant to MCL 767.4. Since then, Director Lyon has supplemented his requests by seeking additional materials that should comprise the record of the inquiry, but these have yet to be released to him.

Among the additional items that have been produced are legal memoranda the Solicitor General provided the judicial officer, subpoenas issued by the Solicitor General and the judicial officers, and background memoranda. Also ordered produced were opinions of the judicial officer that were never made part of the record. They were not filed with the clerk, they do not appear on the register of actions, and they were not transmitted to the Supreme Court with the record as required by statute. For some unexplained reason, they were retained by the Attorney General, not the court.

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Currently pending before the chief judge is Director Lyon's motion to compel production of specific materials such as off-the-record communications between the judicial officer, his staff, and the Attorney General.

Discovery in the trial court has come to a halt. Due to the Attorney General's failure to safeguard confidential material it seized in 2019, the trial court granted Director Lyon's motion for a protective order barring the review and dissemination of any further discovery until the Attorney General implements a taint team, a ruling that the Attorney General has appealed. After more than a year, the Attorney General estimates that they have produced about a quarter of the material that has yet to be produced.

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ARGUMENT

I. Interpreting the judicial inquiry statute to confer charging authority upon a judicial officer violates Michigan's constitutional requirement of separation of powers, MICH CONST 1963 art III, § 2

Standard of Review. Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

A. Introduction

In a 1972 case involving the judicial inquiry statute, the Michigan Supreme Court warned that "[t]he constitutionality of a system whereby a Judge accuses a person of crime may not withstand our re-examination." *People v Bellanca*, 386 Mich 708, 715; 194 NW2d 863 (1972). In *Bellanca* the court ruled that the confrontation clause of the state constitution required production of transcripts of testimony taken by a one-person judicial inquiry.[12] Not briefed by the parties in *Bellanca* was the broader question of whether vesting a member of the judiciary with the power to indict – assuming the statute actually authorized it – violated separation of powers. The court left that question for another day. That day is today, and the statute cannot "withstand [this Court's] reexamination."

This constitutional violation only arises if the statute is interpreted as vesting the investigating judge with charging power, as the circuit court held. Fortunately, the statute can be logically interpreted as not conferring this executive function onto the judiciary thereby avoiding the constitutional problem, as discussed below in Argument II, *infra*.

[12]Interestingly, the production was in contemplation of a preliminary examination being held. "We are persuaded that a defendant charged with perjury before a 'one man grand jury' must have access to the transcripts of the testimony of all witnesses for or against him given before the 'one man grand juror' in order to be accorded due process. In Michigan, the preliminary hearing is a judicial proceeding designed to establish probable cause that a crime has been committed and probable cause to believe the accused committed it. It is a critical stage of our criminal process." 386 Mich at 712. *See* note 9, *supra*.

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B. Perspective: History of the Judicial Inquiry Statute

Michigan's oft-criticized judicial inquiry statute has a long and tumultuous history. First enacted in 1917 and entitled An Act to Authorize Proceedings for the Discovery of Crime, and to Provide Penalties for a Violation of Such Procedure, it grew out of a recommendation of the Committee on Law Reform of the Michigan State Bar Association in 1915. In fact, its origins can be traced back to when Detroit police courts were established and given inquisitorial powers. Joannes Buiteweg, *History of Michigan's One-Man Grand Jury*, 33 U DET LJ 399-400 (1956) (citing 1885 PA 161, § 20); Robert G. Scigliano, *The Michigan One-Man Grand Jury and the Courts: An Appraisal*, 37 U DET LJ 432 (1960).

The statute's purpose was investigatory and designed to strike a balance between the "unwieldy and ineffective" citizen's grand jury and the limited powers regular law enforcement had at the time to conduct public corruption and organized crime investigations. *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). The statute's primary purpose was to facilitate the investigation of crimes by using the traditional powers of the judiciary to compel the attendance of witnesses and grant immunity. *Id.* But, because the original enactment referenced the secrecy and immunity provisions of the citizen's grand jury statute, the judicial inquiry proceedings began to be equated with grand jury proceedings and the media began using the term "one-man grand jury" to describe the statute. *Oakman v Recorder of City of Detroit*, 207 Mich 15; 173 NW 346 (1919).

Over 75 years ago the Michigan Supreme Court called the term a "one-man grand jury" a "misnomer," yet the term nevertheless took hold to describe judicial inquiry proceedings. *In re Slattery*, 310 Mich 458; 17 NW2d 251 (1945); Glenn R. Winters, *The Michigan One-Man Grand Jury*, 28 J AM JUD SOC 137, 138 (1945).[13] More properly stated, the statute allows for a "one-person judicial inquiry" and not a "grand jury."

Throughout its long history, the statute has been the subject of criticism and debate, including repeal in 1949 and a challenge at the constitutional convention in 1963, only to survive in its current form. Twice the United States Supreme Court has considered and restricted

[13]The phrase first appears in caselaw in 1924 in *People v Doe*, 226 Mich 5; 196 NW 757 (1924). Given that the Supreme Court regards the term to be a misnomer, this brief refers to the statute as the "one-person judicial inquiry statute."

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the statute's contempt provisions, *In Re Oliver*, 333 US 257 (1949), and *In Re Murchison*, 349 US 133 (1955), but it has never considered a direct challenge to the statute's structure, despite at least one Supreme Court justice's concern over its constitutionality. *In re Oliver*, 333 US 257, 279 (1948) (Rutledge, J) (the "aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law" and "cannot stand the test of constitutionality"). To this day, popular criticism and debate persist among scholars and legislators alike. Cohn, Hon. Avern, "Why the One -Man Grand Jury in Flint Case is Unfair," *Detroit News* (Mar 10, 2021), www.detroitnews.com/story/opinion/2021/03/11/letter-why-one-man-grand-jury-flint-case-unfair/4645860001/; Editorial Board, "Michigan Should Scrap One-Man Grand Juries," *Detroit News* (Mar 5, 2021), www.detroitnews.com/story/opinion/2021/03/03/editorial-michigan-should-scrap-one-man-grand-juries/6889795002/. EXHIBIT N. In fact, legislation has been introduced to abolish the practice entirely. 2021 SB 159.[14]

As a practical matter, the need for the one-person judicial inquiry disappeared a quarter of a century ago when the Legislature enacted the investigative subpoena act. MCL 767A.1, *et seq*; 1995 PA 148. That act gives prosecutors the tools they need to investigate crimes with judicial enforcement of process and orders of immunity for testimony. Prosecutors can issue subpoenas for testimony and documents, and the judiciary is empowered to enforce the subpoenas. Moreover, secrecy provisions apply. The act was a major expansion of prosecutorial powers, designed to enhance investigations while avoiding the more complicated process of a citizen's grand jury.

In fact, investigative subpoenas were used liberally in round one of the so-called Flint water cases. But investigatory subpoenas are simply an investigative tool – not a charging mechanism – so the prosecutor is left to charge by complaint and warrant followed by a preliminary examination provided for by statute.

No court has considered whether the judicial inquiry statute confers upon the judicial officer not only the investigatory power but also the executive function of charging citizens with a crime and, if so, whether such a construction is constitutional.

[14]For an excellent review and analysis of the statute's early history, see Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY (Michigan State Board of Agriculture 1957).

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C. The structure of the one-person judicial inquiry statute

MCL 767.3 confers on a judicial officer the power to perform an inquiry into whether crimes have been committed within the jurisdiction. Specific prerequisites apply. An investigation may be initiated only upon "the filing of [a] complaint." MCL 767.3. Then, only if the complaint demonstrates "probable cause to suspect [a] crime. . .has been committed within [the] jurisdiction" is a judge authorized to order "that an inquiry be made into the matter relating to such complaint." *Id*. Any order calling for an inquiry "shall be specific to common intent and scope of the inquiry." *Id*. In counties such as Genesee "the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court." *Id*. If those requirements are met, the judicial officer may compel witnesses to appear and answer questions about alleged violation of law which is the subject of the inquiry. MCL 767.3.

If the inquiry satisfies the judicial officer that a crime has been committed and "that there is probable cause to suspect any person to be guilty thereof, he [the judicial officer] may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint." MCL 767.4. If the judicial officer does not make a presentment of a crime or wrongdoing as to any person who the judicial officer has caused to be apprehended, with the person's consent the judicial officer may file a "report of no finding of criminal guilt." *Id*. A "presentment" is not a formal charge; it is a statement of what wrongdoing has been found and generally forms the basis for a formal charge. *Bennett v Kalamazoo Circuit Judge*, 183 Mich 200; 150 NW 141 (1914).

Under this scheme, the judge acts solely as a criminal investigator. It is to be an investigation "under the control of the judge and *not* under the control of either the prosecuting attorney or the Attorney General, one in which the public is interested, and which is entrusted by the statute to the judge." *In re Petition for Investigation*, 270 Mich 328; 258 NW 776 (1935) (per curiam) (emphasis added). The statutes simply do not further provide authority for the judicial officer who conducted the inquiry to issue a formal charge, either by complaint or indictment. Charging comes after apprehension by process. To conduct an investigation, the judge has the authority to request members of the bar to assist in the investigation, but proceedings are

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supposed to be under the control of the judge – not the Attorney General or prosecuting attorney. *Petition of Hickerson*, 301 Mich 278; 3 NW2d 274 (1942).

Because of the power vested in a single judicial officer, there are many limitations on such investigations. For example, witnesses may not be compensated apart from ordinary fees, and they may not be "employed in any capacity by the judge or by any person connected" with the investigation. MCL 767.3. All testimony must be taken before the investigating judge. *Id*. Moreover, an investigation "shall continue no longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months," *i.e.*, 12 months total. MCL 767.4.

One of the challenges here is that both the prosecution and the court below have conflated the one-person judicial inquiry with the citizens' grand jury statute, which is markedly different. MCL 767.7a, *et seq*. The citizen grand jury statute specifically provides for indictment by the grand jury's issuance of a true bill. MCL 767.23. The judicial inquiry statute does not. It has always provided for the case to proceed "as upon formal complaint."

Unlike judicial inquiry proceedings, citizen grand juries are also not limited in scope. Citizen grand juries are given wide latitude to inquire into violations of criminal law and once convened, have broad authority to investigate potential offenses without limitation. *People v Morris*, 228 Mich App 380, 384; 579 NW2d 109 (1998). Some have gone so far as to say citizens' grand juries can perform "fishing expeditions." *Id* at 384 n3. Conversely, judicial inquiries are specifically limited in scope per statute. Judicial inquiries must confine an investigation and "shall be specific to common intent of the scope of the inquiry to be conducted." MCL 767.3.

These critical differences between the judicial inquiry and citizens' grand juries are consistent with the reality that the two proceedings serve different purposes. Citizens' grand juries were created to protect people from government overreach and ensure fair and effective law enforcement. *Morris*, 228 Mich App at 385 (citing *United States v Calandra*, 414 US 338, 343-44 (1974). Conversely, as is noted above and detailed below, judicial inquiry proceedings were created to help with investigations involving recalcitrant witnesses by using a judicial officer to issue subpoenas and grant immunity to compel testimony. *Colacasides*, 379 Mich at 90-91.

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Oakman v Recorder of City of Detroit, 207 Mich 15; 173 NW 346 (1919), is instructive as to the original intent of the judicial inquiry provision, prior to the nomenclature of "one-man grand jury" taking hold and influencing the view of the judicial inquiry process. In *Oakman*, the judicial officer conducting the inquiry issued a presentment, which was "an informal complaint and finding of probable cause." Then later, after the presentment, warrants and a complaint were issued. But the presentment was not the formal charging document, it is a probable cause finding by the judicial officer conducting the inquiry to be followed by a formal complaint. And, of course, when proceeding "in like manner as upon formal complaint," the person charged is entitled to a preliminary examination.

D. Separation of powers limits the judicial officer's authority to investigating and does not authorize charging

The separation of powers between the executive, legislative and judicial branches of government is deeply embedded in the United States and Michigan Constitutions:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

MICH CONST 1963 art III, § 2.

Separation of powers is a "bulwark against tyranny" designed, among other things, to ensure that the executive and judicial power does not end up in the same hands. *United States v Brown*, 381 US 437, 443 (1965). And "although the Legislature has the power to create causes of actions, it has no power to expand the judicial authority granted to the courts by the Michigan Constitution." *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 361; 792 NW2d 686 (2010). For that reason, "an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'" *Judicial Att'ys Ass'n v State*, 459 Mich 291, 305; 586 NW2d 894 (1998) (quoting *Employees & Judge of the Second Judicial District v Hillsdale County,* 423 Mich 705, 717; 378 NW2d 744 (1985) and *United States v Will*, 449 US 200, 228 (1980)). Any legislation which purports to confer "the exercise of powers belonging to either of

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the others, cannot be regarded as valid." *Houseman* v *Kent Circuit Judge*, 58 Mich 364, 367; 25 NW 369 (1885).

Any interpretation of the judicial inquiry statute which would grant a judge charging authority violates these fundamental precepts, and therefore the Michigan Constitution, because it would vest purely executive authority in the hands of a judicial officer. The indictment and prosecution of criminals is a uniquely executive function. *United States v Batchelder*, 442 US 114 (1979). Under the Michigan Constitution, the prosecutor – and the prosecutor alone – is the "constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants." *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999); *see also Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-84, 194 NW2d 693 (1972). As this Court recognizes, under basic "separation-of-powers principles, the constitutional responsibility to determine the grounds for prosecution rests with the prosecutor alone." *People v Muniz*, 259 Mich App 176, 178; 675 NW2d 597 (2003).

The prosecuting attorney is an elected official responsible to the citizens of the county. MICH CONST 1963, art VII, § 4. As chief law enforcement officer of a county, the prosecutor has exclusive authority to decide whether to prosecute a person and what charges to file. *People v Williams*, 244 Mich App. 249, 251-52; 625 NW2d 132 (2001). "The prosecution is not for the benefit of the injured party, but for the public good." *Id* at 253. Thus, "the decision whether to dismiss a case or proceed to trial is within the prosecutor's sole discretion." *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995); *see also People v Killebrew*, 416 Mich 189, 200; 330 NW2d 834 (1982).

In recognition of the prosecutor's "sole" and exclusive authority, Michigan courts have routinely held that any interference of the prosecutorial function by the judiciary violates the separation of powers. *People v Muniz*, 259 Mich App 176; 675 NW2d 597 (2003) (court lacked authority to order prosecutor to issue new informations); *People v Jones*, 252 Mich App 1; 650 NW2d 717 (2002). So, for example, a judge does not have the authority to accept a guilty plea to a lesser charge over the objection of the prosecutor. *Genesee Prosecutor*, 386 Mich at 684. Judges cannot enter orders of *nolle prosequi* without the consent of the prosecutor (unless the prosecutor has abused its discretion) without violating the separation of powers. *People v Nelson*, 66 Mich App 60; 238 NW2d 201 (1975). And a judge's role in plea negotiations is limited

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to sentencing (a traditional judicial role) and not charging decisions. *Killebrew*, 416 Mich at 200; *see generally People v Sekelsky*, 2021 WL 2181069, No. 35214 (Mich Ct App May 27, 2021) (Beckering, J, concurring).[15]

Granting a judicial officer charging authority would go far beyond a judge participating in plea bargaining, issuing orders of *nolle prosequi* or ordering of new informations condemned in the foregoing cases. Rather, doing so purports to allow judges *to make the very charging decisions* which lie at the core of the executive power. The separation of powers prohibition against vesting judicial actors with prosecutorial authority lead future Justice Cardozo to strike down a "one-man grand jury" statute similar to Michigan's. Like the Michigan statute, the New York statute allowed for the appointment of a judge to investigate criminal activity. Justice Cardozo's description of the statute and ultimate conclusion are worthy of being quoted in full:

> [under the statute] the judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. . .. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court.

Matter of Richardson, 247 NY 401, 411-12; 160 NE 655 (1928).

Justice Cardozo's logic applies with even greater force here. The separation of powers is so critical to the protection of liberty that the only time Michigan courts have allowed the sharing of executive power is when a statute doing so is "very limited and specific." *People v Trinity*, 189 Mich App 19, 23; 471 NW2d 626 (1991); *see also People v Payne*, 424 Mich 475, 482-83; 381 NW2d 391 (1985) (deputy sheriff who acts as a magistrate may not issue search warrants because that determination must be made by a person whose loyalty is to the judiciary alone, not law enforcement). Allowing a judge to prosecute is anything but "very limited and specific." Rather, "[i]t is well settled" in Michigan that the decision as to what charges should be pursued in any given case goes to

[15]Attached as EXHIBIT O.

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the very core of the executive function vested solely with prosecutors. *See, e.g., People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998) ("decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor"). Indeed, a prosecutor is the constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants. *People v Conat*, 238 Mich App at 149. A statute purporting to take away this "sole discretion" and vest it with a coordinate branch is not "very limited and specific"; rather it undermines the careful tripartite form of republican government guaranteed by the Michigan and United States Constitutions. US CONST, art IV, § 4 (guarantee clause); MICH CONST 1963, art III, § 2 (separation of powers clause).

Use of the word "indictment" in the judicial inquiry statutes does not change the analysis because the statutes do not give the judicial officer authority to issue the indictments. Instead, the statutes, as noted, merely give the judicial officer authority to make a probable cause finding for the matter to then proceed "in like manner as upon formal complaint." MCL 767.4. When MCL 767.4 uses the word "indictment," it is not granting the judicial officer authority to issue an indictment. It is simply saying that if an indictment ends up being the charging document, the judge who conducted the inquiry cannot then preside over the case as the trial judge or in contempt proceedings involving contemptuous conduct within the judicial inquiry proceeding. The statute also prevents anyone participating in the inquiry, including the judicial officer, from disclosing the existence of an indictment or information from the inquiry at certain times. But nowhere do the statutes confer charging authority on the judicial officer. The statues do the opposite. They specify only that the judicial officer may find probable cause and proceed as upon formal complaint.

E. Michigan authority supports the limited role of the judicial officer in a one-person judicial inquiry

The distinction between vesting courts with incidental authority to investigate criminality under the judicial inquiry statute and the core authority to indict is highlighted in *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). The appellant in *Colacasides* was held in contempt for refusing to answer questions during the course of a judicial inquiry. On appeal, he challenged the judicial officer's authority to investigate offenses on separation of powers concerns. *Id* at 91. This case – which dealt solely with the power of the judicial official to investigate, not

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indict – turned on a provision of the Michigan Constitution which grants circuit court judges the authority to act as "conservators of the peace." The Court ruled that there was no separation of powers issue because "conservators of the peace" at common law possessed the power to *investigate* crime. *Id.*

For three reasons, *Colacasides* supports Director Lyon's position. First, *Colacasides* addressed whether a judge could investigate without running afoul of separation of power concerns. It did not address whether a judge could *charge* without running afoul of such constitutional concerns.

In terms of separation of powers, the power to "investigate" is not vested with any particular branch. The Michigan Constitution recognizes that both the executive and legislature have the power to investigate, which the Michigan Supreme Court has defined as a "quasi-judicial" task. MICH CONST 1963, art I, § 17 (recognizing legislative and executive authority to conduct "fair" investigations); *Buback v Romney,* 380 Mich 209, 218; 156 NW2d 549 (1968) (executive and legislative "investigations have tended to assume a quasi-judicial character"). When the judiciary engages in investigations, it is not contravening a power reserved to the executive or legislature, but rather engaging in a "quasi-judicial" task. *Id.* All three branches can investigate; but the power to charge belongs exclusively to the executive branch.

Second, while *Colacasides* found that judges as conservators of the peach may investigate crime, there is no authority that gives conservators of the peace the power to charge. No Michigan court has ever specifically ruled that their power included the power to indict. Even if the judicial officer had authority under the "conservator of the peace clause" to perform the inquiry, that authority does not include the authority to charge one with a criminal offense. Conservators of the peace traditionally have the authority to issue arrest warrants for violations of the law, hold examinations, and commit to bail. *Averell v Perrott*, 74 Mich 296; 41 NW 929 (1889). Conservators of the peace also have the authority to investigate crime, *Application of Romney*, 381 Mich 1; 158 NW2d 564 (1968) (citing cases), and to order that bonds be posted in order to keep the peace. *In re Gosnell*, 234 Mich App 326; 594 NW2d 90 (1999); *In re Sanderson*, 289 Mich 165; 286 NW 198 (1939). As a conservator of the peace, the judicial inquirer here did not possess authority to charge crimes, only power to investigate. The indictment is therefore invalid and must be dismissed, as the courts lack jurisdiction.

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To further illuminate this point, a brief foray into ancient English criminal procedure is necessary, if for no other reason that *Slattery* and *Colacasides* took the same journey. Candidly, the history dating back to the 13th century of conservators is complex, and their role changed innumerable times over the millennium. By the 16th century, the appellation of "conservators of the peace" applied to two distinct offices: "sheriffs," who primarily exercised an executive function, and "justices of the peace," who served the judicial function.[16] What is clear is that by the reign of Mary the 1st in 1553-54, "conservators of the peace" were not allowed to act as both executors and jurists. As described in the seminal 1831 treatise on the topic *The Justice of the Peace and Parish Officer,* in 1553-54, Parliament passed a law providing that "no sheriff shall exercise the office of justice of the peace during the time that he acts as sheriff." 1 M Sess 2 c 8 s 2. The law was necessary, according to the treatise, because a conservator of the peace "cannot act at the same time both as judge and officer for so he would command himself to execute his own precepts." RICHARD BURNS AND THOMAS CHITTY, THE JUSTICE OF THE PEACE AND PARISH OFFICER (Oxford Press 1831). The notion that a judicial "conservator of the peace" could act as a prosecuting officer was rejected nearly 450 years ago for reasons that are equally valid today.

This point is implicitly recognized by the court in *Colacasides*, which stated the "constant function [of conservators]" was to "take" or receive charges and not "make" them. 379 Mich at 92. Put into the context of criminal procedure and constitutional rights as they exist in 2021, however, nothing in the history of the conservators of the peace suggests that the judicial branch has the power to investigate, charge, and then officiate at the trial of the accused. Certainly, the English Parliament in 1554 agreed that this power did not exist; as should this Court. Combining these three functions into the same branch violates separation of powers and the checks and balances that come with it.

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[16] *See, e.g.*, Edward Hasted, "General history: Justices of the peace," in THE HISTORY AND TOPOGRAPHICAL SURVEY OF THE COUNTY OF KENT: VOLUME 1, pp 215-21 (Canterbury 1797) *available at* British History Online http://www.british-history.ac.uk/survey-kent/vol1/pp215-221 [accessed Mar 8, 2022] (In "the 34th year of king Edward III" "conservators of the peace" were given the power to try felonies "and then they acquired the more honourable appellation of justices of the peace."); 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Ch. 34 (Little, Brown & Co 1908) (In middle age England, "the ordinary conservators of the peace were the sheriff, the coroner [and] the justices of the peace").

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The third reason *Colacasides* does not control here is that reflexively incorporating the English Common law of the 14th century into the Michigan Constitution as it exists today would ignore the last 240 years of constitutional jurisprudence. An understanding of the importance of separation of powers did not exist in the 1300's when the concept of conservator of the peace was first created. The separation of powers become a cornerstone of good governance nearly 400 years later when it was first discussed in detail in the writings of Montesquieu and Locke. *See, e.g.,* Montesquieu, THE SPIRIT OF THE LAWS, vol 1, trans Thomas Nugent (London: J Nourse, 1777), *pp 221-237, passim* ("There is as yet no liberty if the power of judging be not separated from legislative power and the executrix.") To ignore this history and rule that Judges can be prosecutors in 2021 because the Magistrate of Nottingham may or may not have had the power to engage in "indicting" someone in 1382 strains credulity. As pointed out by Justice Cardozo, "[c]enturies of common-law tradition warn us with echoing impressiveness that this is not a judge's work." *Matter of Richardson*, 247 NY at 411-12. Nearly another century has passed since those words were spoken in which Courts have consistently struck down efforts to weaken the separation of powers. As Justice Rutledge of the United States Supreme Court recognized in his review of the statute, the "aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law" and "cannot stand the test of constitutionality." To paraphrase the Michigan Supreme Court, "[t]he constitutionality of a system whereby a Judge accuses a person of crime [in the year 2021 cannot] withstand our re-examination." *People v Bellanca*, 386 Mich at 715.

This point was made evident in the Supreme Court's decision in *Morrison v Olson*, a case involving the constitutionality of an independent prosecutor statute. 487 US 654 (1988). The statute allowed the Attorney General to ask a "special division" of federal court judges to appoint a special prosecutor to investigate claims against executive officials. The statute was challenged for violating the separation of powers. The Court held for four reasons that vesting the appointment of an inferior and temporary executive official with the Court did not violate the "separation between the judiciary and the other branches of the Federal Government." 487 US at 680-81. A comparison of that decision with the judicial inquiry statute highlights the unconstitutionality of vesting indictment authority with a judicial officer.

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First, the Court noted in *Morrison* that the United States constitution specifically authorized the appointment of "inferior" executive officials by "courts of law." *Id* at 679. In contrast, nothing in the Michigan Constitution specifically authorizes Michigan Courts to commence the prosecution of criminal defendants.

Second, the Court noted that the powers granted to the judicial panel under the special counsel act were "passive," "administrative," and "ministerial" in nature, such as "receiving reports" or awarding attorneys' fees. *Id* at 681-85. Here, deciding whether to file criminal charges is anything but "passive" and ministerial; it goes to the heart of the executive function.

Third, the Court placed great weight on the fact that the appointing court had no authority to supervise the activities of the special prosecutor, stating "[t]he Act simply does not give the [judges] the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority." *Id* at 681. Here, the proposed interpretation of the one-person investigatory statue would go far beyond conferring supervisory authority to awarding the judiciary actual "prosecutorial authority."

Finally, the court noted that the special prosecutor could be removed by the Attorney General "for cause" and was required whenever possible to abide by the rules laid down by the executive branch. Accordingly, the special prosecutor remained an executive officer under the control of the executive branch. *Id* at 695-96. But here the executive branch (*i.e.,* prosecutors) has no control whatsoever over the judicial official exercising prosecutorial authority. More importantly, the judicial official is subject only to the rules of the Court; not the rules that govern the activities of executive branch prosecutors. And, as discussed below, Genesee County did not have any rules governing these kinds of judicial investigations; meaning that the judicial official here had no rules to follow.

Justice Scalia's characteristically prescient dissent leads to the same conclusion. After first agreeing with the majority that the prosecutorial function belongs exclusively to the executive, *id* at 705, he observes that under the constitution, as is the case in Michigan, executive power rests exclusively with the executive, which does not mean *some* power; it means *all* the executive power. *Id.* Congress' conferring some executive authority upon members of the judiciary is plainly proscribed by the separation of powers doctrine.

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So too in Michigan under article II, section 2, of the Constitution. If the judicial inquiry provisions are to be construed to give the judiciary the authority to charge, they violate the separation of powers doctrine.

F. The separation of powers violation here is even more evident when the judicial inquiry statute gives unbridled authority to investigate and prosecute the highest members of the executive branch

The concerns which animate the Michigan Constitution's strict separation of powers are particularly pronounced given the roles played by the indicted individuals. This case does not involve a lowly bank official, as in *Slattery*, or a bar owner accused of giving bribes, as in *Colacasides.* Rather, the judiciary here is seeking to bring charges against the highest-ranking executive officials, including the former governor and a member of his cabinet, the director of MDHHS, Director Lyon. One can scarcely imagine a greater attack on the separation of powers than the legislature delegating to the judicial branch the ability to initiate a prosecution of the highest officials in the executive branch.

The danger in allowing the judiciary to interfere with the executive function was recognized in *Buback v Romney*, 380 Mich 209; 156 NW2d 549 (1968), a case that involved a statute which allowed the judiciary to preside over hearings on whether an executive official should be removed from office. The Michigan Supreme Court held that the legislature could not delegate to the judiciary powers that circumscribe executive function – removal of an executive from office – without violating the separation of powers. Per the court:

> [T]he separation of powers article would apply to a court as follows: No person (a judge) exercising powers (judicial power) of one branch (the court of justice which constitutes the judicial branch) shall exercise powers properly belonging to another branch.

Buback, 380 Mich at 226.

The logic of *Buback* applies with even greater force here. In *Buback* the statute was struck down even though the invasion of the Executive's authority was minimal because the court only had the authority to preside over removal hearings, not to make final removal decisions. Here, the investigatory statute has been interpreted as giving the judiciary final authority over the nature and timing of the charges, and who gets charged, all at the "very essence of prosecutorial discretion." *Morrison,* 487 US at 708 (Scalia, J, dissenting).

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Allowing the judiciary to unilaterally bring charges against high executive officials without any check would invade the Executive's authority to "take Care that the Laws be faithfully executed"; a power granted solely to the governor and his appointed department chiefs. MICH CONST 1963 art V, §§ 1, 2 and 8. As the United State Supreme Court has noted, "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Nixon v Fitzgerald,* 457 US 731, 750 (1982). But this "intolerable" invasion is exactly what is occurring here. The judiciary, acting in secrecy, has decided to unilaterally bring charges against high executive officials, second guessing the scope of their constitutional duties, without the benefit of due process, a transparent preliminary exam and bypassing the charging discretion the Michigan Constitution vests solely with prosecutors. This is an "intolerable" invasion of separation of powers.

But as explained below, the Court need not go so far as to hold the statute unconstitutional. It need only hold that the statute does not confer charging authority upon the judicial officer conducting the inquiry under MCL 767.3, *et seq*.

II. The judicial inquiry statute does not confer charging authority on the investigating judicial officer making the indictment invalid and requiring dismissal

Standard of Review. Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

Whenever possible, courts should interpret statutes to avoid constitutional dilemmas. *See, e.g., House Speaker v Governor*, 443 Mich 560, 585; 506 NW2d 190 (1993) ("constitutional construction requires us, if possible, to avoid an interpretation that creates a constitutional invalidity"). The judicial inquiry statue should be interpreted as not granting the judiciary the power to indict.

Here, the juror was authorized to conduct the inquiry and, if he found probable cause, to make a presentment and arrest warrant. But he was not authorized to issue a criminal charge – a complaint or indictment. Yet, he was the sole signatory on the indictment, certifying that the "foregoing indictment is a TRUE BILL." EXHIBIT G.

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It was the filing of the indictment by the judicial officer that purported to confer jurisdiction. But the indictment is invalid because it was issued by a judge who was without authority to do so. The trial court has no jurisdiction, and the charges must be dismissed.

In its order denying the motion, the trial court relied heavily on *People v Green*, 322 Mich App 676; 913 NW2d 385 (2018). But *Green* is inapposite. The defendant in *Green* alleged ineffective assistance of counsel on the basis that counsel had not challenged his indictment for violations of rights to counsel and confrontation due to the use of the one-person judicial inquiry. In rejecting the claim, this Court simply observed that the procedure

> is used to determine *whether criminal proceedings should be instituted* against an individual by way of an indictment, *there is not yet a formal charge, preliminary hearing*, indictment, information, or arraignment that indicates adversarial judicial proceedings have begun. . ..

322 Mich App at 685 (emphasis supplied).[17] So *Green* acknowledges that the judicial officer's function is limited to investigation, not charging. The closest the Michigan Supreme Court has come to addressing the question was in *People v Duncan*, 388 Mich 489, 498-99; 201 NW2d 629 (1972), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001). There, the Court noted how preliminary the judicial inquiry is, observing that the Legislature expressly intended to provide for a preliminary examination unlike the citizens' grand jury procedure:

> When the legislature did intend to provide for a preliminary examination after a one-man grand jury indictment, it did so by specific statutory language.

Duncan, 388 Mich at 498-99 (citing 1927 PA 175, ch VII, § 4; MCL 767.4[18]), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001).[19]

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[17]Although *Green* notes that the judicial inquiry serves the same function as the preliminary examination – to determine probable cause – that is mere *dictum*, and the comment is not germane to the issue of whether a judicial officer has authority to charge in the first instance. *Green*, 322 Mich App at 687.

[18]Upon a finding of probable cause, the judge is to issue an arrest warrant or summons upon the return of which the judge "shall proceed with the case, matter or proceeding in like manner as upon formal complaint." MCL 767.4.

[19]The prosecution maintains that *Glass* stands for the general proposition that a defendant is not entitled to a preliminary examination following indictment, no

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To understand the role of *Duncan* in the jurisprudence of judicial inquiries, three points are essential. First, *Glass* did not involve a judicial inquiry. Second, the basis on which *Glass* overruled *Duncan* was the prior court's improper reliance on its rulemaking authority to create a right to a preliminary examination. *Glass*, 464 Mich at 283. The instant challenge, however, does not rely on the Court's rulemaking authority, so the infirmity in *Glass* does not apply here. Third, although *Glass* notes that *Duncan* did not rely on due process principles to create the right to a preliminary examination, *Glass*, 464 Mich at 282, that is irrelevant. The challenge here does not rely on due process principles alone. It relies on the *interpretation of the statute* which *Glass*'s holding did not affect, and it relies on separation of powers principles not even presented or considered. *Duncan* noted the basic proposition, which *Glass* left undisturbed: that the Legislature expressly provided for a preliminary examination under the terms of the one-person judicial inquiry statutory scheme. *Duncan*, 388 Mich at 498-99.[1]

The judicial inquiry statute contemplates proceeding as upon formal complaint followed by a preliminary examination. It provides that upon a finding of probable cause, the court having jurisdiction "shall proceed. . .in like manner as upon *formal complaint*," and the judicial officer conducting the inquiry "shall be disqualified from acting as the *examining magistrate* in connection with the hearing on the complaint or indictment." MCL 767.4 (emphasis supplied). This interpretation is augmented by the fact that the Michigan Supreme Court has long recognized the right to a preliminary examination following a judicial inquiry. *Oakman v Recorder of City of Detroit*, 207 Mich 15; 173 NW 346 (1919) (presentment followed by formal complaint and preliminary examination); *People v McCrea*, 303 Mich 213, 247; 6

[1]Although whether one is entitled to a preliminary examination is not directly involved here, we address the question to avoid confusion that the prosecution might create. MCR 6.112(B) does, indeed, provide that an "indictment is returned and filed without a preliminary examination," suggesting that the defendant is not entitled to a preliminary examination here. The Code of Criminal Procedure provides that the term "indictment" includes an information, presentment, complaint, warrant or any formal written accusation. MCL 761.1(g). This issue still comes down to interpreting the right the Legislature created in MCL 767.4, which, in fact, provides for a preliminary examination. *Duncan*, 388 Mich at 498-99. The court rule does not control here, because substantive rights provided for by statute control over court rule provisions. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002); *see also Stenzel v Best Buy Co, Inc*, 320 Mich App 262; 906 NW2d 801 (2017).

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NW2d 489 (1942) (holding that judicial officer conducting inquiry was not precluded from presiding at preliminary examination, a holding that was rendered a nullity by an amendment to the statute, 1947 PA 33); *People v Bellanca*, 386 Mich 708, 715; 194 NW2d 863 (1972) (defendant entitled to discovery for preliminary examination following judicial inquiry); *People v Duncan*, 388 Mich 489, 498-99; 201 NW2d 629 (1972) (Legislature provided for preliminary examination following judicial inquiry), *overruled on other grounds*, *People v Glass*, 464 Mich 266; 627 NW2d 261 (2001). *Glass* – which the prosecution reads to eliminate preliminary examinations following "indictment" does not address the judicial inquiry process, and it cannot be read to overturn a century of Michigan Supreme Court holdings consistent with the plain language of the statute.

Moreover, nothing in the text of the judicial inquiry statute authorizes the "one-man grand juror" to issue an indictment, even if an indictment is the appropriate charging instrument to follow a judicial inquiry.[21] In other words, the judicial officer proceeds as if on formal complaint, with the prosecutor exercising discretion to file a charge, whether that be called an indictment or complaint, followed by a preliminary examination.

The statutes and the caselaw make it clear that the judicial officer's function is to investigate, not charge. Again, that means the indictment issued against Director Lyon is invalid and the courts lack jurisdiction to proceed.

III. The indictment must also be dismissed because it was the product of an investigation that violated the terms of the statute and Director Lyon's right to due process

Standard of Review. Constitutional issues and questions of statutory interpretation are reviewed *de novo*. *People v Wiley*, 324 Mich App 130; 919 NW2d 802 (2018); *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008).

[21]Much is sometimes made of the term "indictment" to suggest that it is the charging instrument used in grand jury proceedings. For almost a century, however, the Michigan Code of Criminal Procedure makes it clear that an "indictment" includes virtually all forms of charging instruments. MCL 761.1(g). Calling something an "indictment" does not make it a properly filed charge in the proper court. More importantly, neither MCL 767.3 nor MCL 767.4 refer to the charging instrument arising from a judicial inquiry to be an "indictment."

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A. The investigation did not comply with the statute

As stated above, the chief judge appointed a colleague as a "one-person grand juror" pursuant to MCL 767.3. Before initiation of such proceedings, however, there are prescribed statutory requirements, many of which were violated here. Those violations include the following:

Investigation initiated contrary to statute. Under the statute, the order directing an inquiry "shall be made in accordance with the rules of such court." MCL 767.3. Other counties have specific rules establishing the method for reviewing and approving applications to conduct investigations. *See, e.g.*, Ingham County, 30th Judicial Circuit (Rule 6.107); Oakland County, 6th Judicial Circuit (Rule 6.107). Genesee County does not. EXHIBIT P. So, the investigation was ordered by some unknown means contrary to the statute.

Judicial officer designated contrary to statute. Under the statute, the designation of the judicial officer to conduct the inquiry is also to be made pursuant to court rule. But, again, there was no court rule here. Although another judicial officer was drawn by lot, the chief judge reassigned the matter to Judge Newblatt, citing MCR 8.111(B) on assignment, not reassignment. There is no indication that the protocol for reassignment was followed.

Wrong oath administered. At the commencement of the proceedings, court staff and staff of the Attorney General were all administered an oath

> to *diligently inquire* into and make true presentment in *seeking indictment* of all such matters and things as shall be given you in charge or otherwise come to your knowledge, *touching your grand jury service*.

TRANSCRIPT at 6-11 (Jan 23, 2020) (emphasis supplied).[22] That oath – which is the citizens' grand jury oath – required those who took it to investigate and *charge* people with crimes. *See* MCL 767.9. The judicial officer acknowledged that it simply administered the oath that he had been given by the Attorney General.[23] This process necessarily calls into question the role of the various people who took this oath, particularly

[22]*See* note 10, *supra*; EXHIBIT L.

[23]One of the judges noted the scope of the oath, and the investigating judicial officer responded, "That's the oath that. . .we were provided. . .by the AG's office." TRANSCRIPT at 13 (Jan 23, 2020).

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since the judicial inquiry statute makes no provision for such extraneous participants.[24]

Indictments returned off the record. The indictment against Director Lyon purports to have been signed on January 8, 2021 – out of time – but it was not contemporaneously filed with the court. The judicial inquiry was not in session on that date, so there is no transcript of any proceedings. The register of actions for the proceeding bears no entry on that date. And the material the court sent to the Supreme Court as required by statute did not include the indictments or any indication as to when they were returned. The indictment does not appear as part of the record until it was filed with the circuit court on January 13, 2021 – well beyond the term of the judicial officer.

Indictments filed out of time. The order granting the application expressly provided that the term was to begin January 1, 2020. It also provided that proceedings "shall continue no longer than six (6) months, unless extended by the specific order of this Court or this Court's successor for an additional period not to exceed six (6) months." EXHIBIT E (Order ¶ 7, at 3). In a June 4, 2020, order, the judicial officer – not the chief judge – purportedly modified the chief judge's order, stating that "the One-Person Grand Jury appointed by and through this court in an Order dated January 9, 2020, due to expire on July 9, 2020, is hereby extended for six (6) months to January 9, 2021. All other orders in the Order dated January 9, 2020, remain in effect." EXHIBIT F. But the June 4, 2020, order was not entered by the chief judge or his successor. And the June 4, 2020, order lacked the legal authority to extend the judicial inquiry proceedings past December 31, 2020, under MCL 767.4. The indictment was not filed until January 13, 2020, which, under any interpretation of the orders, was beyond the term of the judicial inquiry, rendering the instrument defective.[25]

And while the circuit court order denying the motion to dismiss essentially equates an indictment issued after a judicial inquiry with an indictment issued by a citizens' grand jury, the indictment issued here

[24]The judicial officers who took the oath were Hon. Duncan M. Beagle, Hon. Richard B. Yuille, Hon. Nathaniel C. Perry III, and Hon. Christopher R. Odette.

[25]The timeliness of the indictment, although raised by the defense in its motion to dismiss, was not addressed by the trial court in its order denying the motion. This is likely because the issue was also made part of a separate motion to dismiss filed by a related defendant, Nancy Peeler, in which Director Lyon joined. The trial court has yet to rule on that motion.

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does not even comply with the citizens' grand jury pleading requirement. MCL 767.25 requires the endorsement of witnesses on the indictments returned by a citizens' grand jury. The indictment here contains none.

Extraneous officials. The oath was administered to more than 40 people, including the Solicitor General, various AAGs and staff, the sheriff and court staff. But the judicial inquiry statute makes no provision for all these extraneous persons charged with investigating and returning indictments. It is the responsibility of the judicial officer to investigate – and investigate alone. Although he is entitled to appoint persons to assist him, he did not do so and proceedings are under the control of the judge, not the Attorney General or prosecuting attorney. *Petition of Hickerson*, 301 Mich 278; 3 NW2d 274 (1942). The Solicitor General and the AAGs regularly appeared during the proceedings "on behalf of the People," offered "People's Exhibits," and made "closing arguments" on behalf of the People.[1] They did not function in their proper role as judicial officer's assistants; instead, they were *ex parte* advocates treating the judicial officer as if he were a citizen grand jury. The judicial officer is to conduct the investigation and he may have assistants, but he is not the charging official. It is up the prosecuting official to charge in his or her discretion. Beyond the investigation, his authority is limited to "caus[ing] the apprehension of such person by proper process" with the case proceeding before "the judge having jurisdiction [who] shall proceed with the case. . .in like manner as upon formal complaint." MCL 767.4.

Public accounting. The judicial inquiry statute includes a special provision requiring the judicial officer to account for the expenses incurred in the investigation. Here, however, the judicial officer's public accounting reflects that the court did not spend any money on the investigation – even though the investigation spanned a full year involving 47 witnesses and more than 1,400 exhibits. EXHIBIT M. Obviously, the Attorney General is the one who financed and controlled this investigation, not the judicial officer, which is – again – not contemplated by the statute. An example of a public accounting from another judicial inquiry conducted in Ingham County reflects the proper

[1]"Fadwa Hammoud, Solicitor General on behalf of the People from the Attorney General's office." TRANSCRIPT at 3 (Feb 17, 2020). "Molly Kettler on behalf of the People of the State of Michigan. . . . We're going to make a closing argument today regarding our request for involuntary manslaughter indictments for Nick Lyon and Eden Wells." TRANSCRIPT at 5 (Nov 12, 2020).

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role of the judicial officer and those who assist in the investigation. EXHIBIT Q.

Off-the-record contacts. The record also reflects instances in which the AAGs communicated with the judicial officer by means other than on the record. There were requests for off-the-record discussions, and it appears that documents and other materials were sent to the judicial officer off the record. TRANSCRIPT at 132 (Feb 29, 2020); TRANSCRIPT at 46 (Oct 15, 2020); TRANSCRIPT at 68 (Nov 17, 2020); TRANSCRIPT at 5 (Dec 2, 2020). Moreover, the transcripts reflect that the indictments were evidently prepared not by the judicial officer but by Attorney General's office and, in some cases, handled off the record. TRANSCRIPT at 53-54 (Dec 17, 2020).

Witnesses in the employ of the Attorney General. Under the judicial inquiry statute, witnesses "shall not be employed in any capacity by the judge or *by any person connected with such inquiry*, within the scope of the inquiry being conducted." MCL 767.3 (emphasis supplied). But at least two witnesses who appeared were employed by the Attorney General. TRANSCRIPT at 80 (Mar 16, 2020); TRANSCRIPT at 4 (Jul 31, 2020).

As if these irregularities were not enough, other aspects of the judicial inquiry did not observe traditional notions of judicial independence. For example, the judge who authorized expansive – and controversial – search warrants on the Department of Attorney General, KLDiscovery, its eDiscovery vendor, and DTMB, was the same judge who later swore to participate in the judicial inquiry and took the oath of a citizen grand juror – to investigate and charge the client. Moreover, the Solicitor General chose on occasion to use investigative subpoenas to compel the testimony of witnesses. But those applications were not made to a neutral and detached judicial officer. They were made to, and approved by, the judicial officer conducting the judicial inquiry, Judge Newblatt.

Apart from being a product of its times, the judicial inquiry process, 1917 PA 196, was created to address three infirmities in the criminal justice system that existed more than a century ago. Prosecutors did not have the power to subpoena witnesses and put them under oath, they could not compel testimony and punish for contempt, and they had no independent authority to grant immunity to secure needed testimony. Robert G. Scigliano, THE MICHIGAN ONE-MAN GRAND JURY 20 (Michigan State Board of Agriculture 1957). Today, that is no

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longer the case. Prosecutors now have the benefit of the investigative subpoena statute, MCL 767.1, *et seq*., which empowers them to compel testimony, seek contempt sanctions and authorize immunity.

Here, the Attorney General did not petition for a judicial inquiry for any proper investigative purpose. It could have used the methods of the OSC, which included interviews and investigative subpoenas, but it did not. Use of the judicial inquiry as a tactic rather than a tool is best illustrated in the results obtained. Of all the fact witnesses pertaining to Director Lyon identified to date, *none* was new to the case. In fact, 10 of them testified at preliminary examinations in 2017 and 2018, and for all the others the OSC had produced either witness statements or investigative subpoena transcripts. Many were state employees whose emails and other information was previously disclosed. Some were people who agreed to speak with the defense. Some even had made very public statements. The exhibits were all part of the original database. This was not a new investigation. It was an old investigation re-packaged to avoid a preliminary examination, and it hardly required compulsory process or secrecy.

Why was the prosecution so determined to avoid a preliminary examination? Because when the defense was allowed to cross-examine the exact same witnesses, introduce exculpatory documentary exhibits, and file motions seeking to dismiss the exact same charges, the prosecution was on the eve of seeing its entire case unravel. It was only by gaming the system that the prosecution could avoid seeing its case blown up a second time. And if there is any doubt that was what the prosecution was trying to do, it is removed by the fact that *the prosecution failed to provide the exculpatory evidence the defense team developed in the first prosecution*. For example, the prosecution failed in the judicial inquiry to provide:

- evidence that MDHHS led and worked with the local health department on giving notice of the outbreak, which was provided to the entire medical community in Genesee County *within days* of Director Lyon being told of the situation
- evidence that the likely source of the outbreak was McLaren Hospital with which MDHHS and the local health department were working to mitigate its problem, which caused the decrease in cases likely the result of McLaren's mitigation efforts

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- evidence – factual or expert – of causation between any failure by Director Lyon and the deaths that are alleged

This proceeding was not designed to investigate. Indeed, there was no need to investigate. The process was designed to bring different charges under the mistaken belief that the proofs would not be tested prior to trial.

B. The manner in which the investigation was conducted violated due process

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[n]o person shall. . .be deprived of life, liberty, or property without due process of law. US CONST AMEND V. Michigan provides the same guarantee in its Constitution's Declaration of Rights: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." MICH CONST 1963 art 1, § 17. The manner in which the judicial inquiry statute was used here violates these guarantees and requires dismissal of the Grand Jury Felony Indictment.

From the initiation of the inquiry through the return of the "indictments," the judicial inquiry statute's carefully reticulated requirements were treated as though they did not exist. Even administrative agencies that do not follow their own procedural rules violate one's due process rights. *Abbott v Howard*, 182 Mich App 243; 451 NW2d 597 (1990) (voiding worker's compensation award under due process principles under Michigan and United States constitutions when agency did not follow its own procedural rules); *see also United States v Caceres*, 440 US 741, 751 n14 (1979) ("It does not necessarily follow. . .as a matter of logic or law" that an agency has no duty to follow its own rules); *Morton v Ruiz*, 415 US 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."). *A fortiorari*, the statutory violations here rise to the level of a due process violation.

We recognize that there are limits to the protections due process provides. For example, in *Barclay v Florida*, 463 US 939 (1983), the Supreme Court upheld a death sentence even though it had been imposed in violation of state law. A "'mere error of state law' is not a denial of due process." 463 US 954 (citing *Gryger v Burke*, 334 US 728 (1948)). But here the due process concerns are not mere violations of

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rules. They are structural and based on a charging scheme that violates separation of powers.

From the record available to date, we know several things. Even though the statute specifically requires the court to have rules, it did not. The "order [directing an inquiry] and the designation of the judge" shall be pursuant to local rules. MCL 767.3. As a consequence, there was no process or standard to consider whatever petition that was made. There was no process or standard for selecting the judicial officer to conduct the inquiry. We also know that over the course of a year, about 45 witnesses were called and 1,400 exhibits were offered. Yet, the judicial officer incurred no expenses. EXHIBIT M. Contrary to the intent and requirements of the statute, this was the Attorney General's presentation and argument to a judicial officer, not an independent investigation conducted by a judicial officer. *See Petition of Hickerson*, 301 Mich at 282 (citing *In re Petition for Investigation of Recount*, 270 Mich 328; 258 NW 776 (1935)). Simply put, it was an illegal *ex parte* preliminary examination without the defendant. What is missing is a probable cause determination by a neutral and detached magistrate or body because the investigating judicial officer cannot perform that function under the literal terms of the statute, MCL 767.4 ("shall be disqualified from acting as the examining magistrate") or the requirements of due process.

In addition to these apparent infirmities, further examination of the grand jury proceedings themselves may very well reveal other irregularities, just adding to the due process argument here.

Even when its provisions have been properly followed, the judicial inquiry statute has been subject to due process criticism over time as noted in *Oliver* and *Murchison*, particularly in Justice Rutledge's observations in *Oliver*. *Colacasides* considered a due process challenge, which took into account those criticisms. In finding no constitutional issue, the court contrasted those many criticisms with the many amendments to the statute. For example, it noted that the statute now affords witnesses more rights and limits the judicial officer's powers. It noted that the judicial officer could not act as the examining magistrate or hear a motion to dismiss or quash and that that the judicial officer has reduced contempt powers and that restrictions were put in place to limit the scope of inquiries. 379 Mich 98-99. Those many amendments, however, do not address the fundamental concerns presented here.

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Moreover, as the Court noted five years later – and 50 years ago – in *Bellanca*, the statute's constitutionality is an open question.

The judicial inquiry statute as used here violated federal and state constitutional guarantees, and the charge that the investigation under which it was conducted produced must be dismissed.

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CONCLUSION AND REQUEST FOR RELIEF

For the above reasons, Defendant-Appellant Director Lyon respectfully requests that the Court grant this application for leave to appeal, reverse the decision of the circuit court and order that the case be dismissed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief is filed pursuant to AO 2019-6 and contains 15,961 countable words (exclusive of the title page, table of contents, index of authorities, statement of the basis of jurisdiction, statement of the questions involved, signature block and listing of counsel, certificate of compliance and exhibits) and is prepared in 12-point Century Schoolbook typeface.

s/ *Charles E. Chamberlain, Jr.*

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

Tracy L. Evans, being first duly sworn, deposes and says that she is a paralegal in the employ of the law firm of Willey & Chamberlain LLP, and that she served a true copy of the attached:

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to the clergyman or magistrate who is to officiate at the marriage. On the return of the license to the county clerk, as hereinafter provided, with the certificate of the clergyman or magistrate that the marriage has been performed, he shall record in the book of registration in their proper places of entry the date and place of the marriage, the names and residences of two witnesses to the marriage, and the name of the officiating clergyman or magistrate. All licenses and certificates so issued and returned shall be preserved on file in the office of the county clerk, and he shall as often as once in three months make a faithful report to the Secretary of State of all licenses and certificates issued and received by him.

Return of license.

Filing of.

Approved May 10, 1917.

[No. 196.]

AN ACT to authorize proceedings for the discovery of crime, and to provide penalties for a violation of such procedure.

The People of the State of Michigan enact:

Complaint, filing of.

SECTION 1. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police justice or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance, shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

Witness, attendance of.

Compensation.

Apprehension of persons suspected.

SEC. 2. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process, and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in

like manner as upon formal complaint, and in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

Refusal of witness to appear.

SEC. 3. Any witness neglecting or refusing to appear in response to such summons, or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt, and shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding sixty days or both at the discretion of the court: *Provided,* That if such witness, after being so sentenced, shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

Proviso.

Incriminating answers.

SEC. 4. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him, except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

Approved May 10, 1917.

[No. 197.]

AN ACT making an appropriation for the erection of a State armory in the city of Flint.

The People of the State of Michigan enact:

Authorizing construction of.

SECTION 1. The State Military Board is hereby authorized and directed to construct an armory in the city of Flint for the use of the national guard organizations now or hereafter located within said city, which armory shall be constructed for the accommodation of at least four company units.

Provisions governing.

SEC. 2. In the construction of the said armory the State Military Board shall be governed by all of the provisions of existing law relative to the construction of armories, except as provided for herein.

Appropriation.

SEC. 3. There is hereby appropriated out of the general fund of the State not otherwise appropriated the sum of sixty thousand dollars for the purposes of this act, which sum

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[No. 175.]

AN ACT to revise, consolidate and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts and of the judges and other officers thereof under the provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses; to provide for the arrest of persons charged with or suspected of criminal offenses; to provide for bail of persons arrested for or accused of criminal offenses; to provide for the examination of such persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and to provide for the procedure therein; to provide for judgments and sentences of persons convicted of criminal offenses; to provide for procedure relating to new trials, appeals, writs of error and bills of exception in criminal causes; to provide a uniform system of probation throughout the state of Michigan, the appointment of probation officers and to prescribe the powers, duties and compensation of such officers and to provide penalties for the violation of the duties of such officers; to provide for procedure governing proceedings to prevent crime; proceedings for the discovery of crime; to provide for the jurisdiction, powers, duties, and procedure of justices of the peace in criminal cases; to provide for fees of officers, witnesses and others in criminal cases; miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act and to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act.

The People of the State of Michigan enact:

SECTION 1. This act shall be known as "The Code of Criminal Procedure." Title of act.

SEC. 2. This act is hereby declared to be remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof. How construed.

CHAPTER I.

Definitions.

In this act: Terms defined.

The singular number includes the plural and the plural includes the singular.

The masculine gender includes the feminine and neuter genders.

The words "person," "accused," and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, unincorporated or voluntary associations.

The term "act" or "doing of an act" includes "omission to act."

The word "property" includes any matter or thing upon or in respect to which any offense may be committed.

The word "indictment" includes information, presentment, complaint, warrant and any other formal written accusation.

The word "indictment," unless a contrary intention appears, includes any count thereof.

The term "writing," "written" and any term of like import includes words printed, painted, engraved, lithographed, photographed or otherwise copied, traced or made visible to the eye.

The term "magistrate" wherever used in this act is defined as including all officials named in section one of chapter four of this act, excepting justices of the supreme court and circuit judges; and judges of courts of record having jurisdiction of criminal causes: *Provided,* That nothing herein shall be construed as limiting the power of justices of the supreme court and circuit judges and judges of courts of record having jurisdiction of criminal causes under this act or depriving them of the power to exercise in their discretion the authority of magistrates.

Proviso.

The term "felony" when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison.

CHAPTER II.

Courts.

Jurisdiction, etc., of courts.

SECTION 1. The various courts and persons of this state now having jurisdiction and powers over criminal causes, shall have such jurisdiction and powers as are now conferred upon them by law, except as such jurisdiction and powers may be hereinafter repealed, enlarged or modified.

Justices, powers, etc., of.

SEC. 2. Any justice of the peace is empowered and authorized to perform all official acts and duties and to exercise jurisdiction in criminal causes in any township or city situate in the county within which the justice of the peace was elected and qualified, with the same rights and powers as though performed and exercised within the city or township in which such justice of the peace was elected and qualified.

Offenses on boundary of two counties.

SEC. 3. Any offense committed on the boundary line of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county.

Jurisdiction, when not questioned.

SEC. 4. Whenever any court of record having criminal jurisdiction, the boundaries of whose jurisdiction as fixed by statute are not coincident with the boundary lines of a county or counties, shall take jurisdiction or have pending before it any trial or cause arising out of the commission of an offense at, on or near to the boundary line of the jurisdiction of said court, the jurisdiction of said court shall not be questioned, after the swearing of the jury, unless the evidence shall show the offense to have been committed more than one hundred rods outside of the boundary of the jurisdiction of said court as fixed by statute.

Offense, where may prosecute.

SEC. 5. If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in one county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county.

Offense committed on high seas, etc.

SEC. 6. If any such mortal wound shall be given, or other violence or injury shall be inflicted or poison administered on the high seas, or in any other navigable waters, or on land, either within or without the limits of this state, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death shall have ensued.

Change of venue.

SEC. 7. Each court of record having jurisdiction of criminal cases upon good cause shown by either party may change the venue in any cause pending therein, and direct the issue to be tried in the circuit court of another county, and make all necessary rules and orders for the certifying and removing such cause, and all matters relating thereto, to the court in which such issue shall be ordered to be tried, and the court to which such cause shall be so removed shall proceed to hear, try and determine the same, and execution may thereupon be had in the same manner as if the same had been prosecuted in the court having original jurisdiction of such cause, except that in all causes when the defendant shall be convicted and be sentenced to imprisonment in the county jail or to pay a fine, or to both such imprisonment and fine, the court awarding such sentence shall have authority to direct and shall direct that the defendant be imprisoned in the county jail of the county in which such prosecution commenced; and that such fine, when paid, shall be paid over to the county treasurer of the county in which such prosecution commenced, in the same manner as is now provided by law for paying over fines to county treasurers; and in every case where a change of venue is ordered, all expenses of such trial shall be a charge upon the county in which the prosecution originated; and when there shall be a disagreement of the jury on the trial of any criminal cause in the circuit court to which such cause was ordered for trial, the circuit judge before whom the same was tried, if he shall deem that the public good requires the same, may, upon cause shown by either party, order and direct the issue to be tried in the circuit court of

Execution.

Expense, who to pay.

another county in the state; and the court to which such cause shall be removed shall proceed to hear, try and determine the same in the same manner and with like effect as was pursued by the circuit court making such order:

Proviso. *Provided,* That in any and all suits, proceedings, causes or actions now pending in any of the circuit courts of this state, whether the court has general or special jurisdiction, a change of venue may be had in the manner provided and in accordance with section ten of act number one hundred fifty-seven of the public acts of eighteen hundred fifty-one, as amended by act number three hundred nine of the public acts of nineteen hundred five and the provisions of said act shall be continued in full force and effect for such purpose:

Further proviso. *Provided further,* That in all suits, proceedings, causes or actions in which a change of venue has been granted, the court to which such suit, proceeding, cause or action has been transferred, shall retain jurisdiction.

CHAPTER III.

Rights of Persons Accused.

Rights of party accused. SECTION 1. On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.

When convicted. SEC. 2. No person charged with an offense shall be convicted thereof unless by confession of his guilt in open court or by admitting the truth of the charge against him or after trial by the court or by the verdict of a jury accepted and recorded by the court.

Trial without jury. SEC. 3. In all criminal cases arising in the courts of this state whether cognizable by justices of the peace or otherwise, the defendant shall have the right to waive a determination of the facts by a jury and may, if he so elect, be tried before the court without a jury. Except in cases cognizable by a justice of the peace, such waiver and election by a defendant shall be in writing signed by the defendant and filed in such cause and made a part of the record thereof. It shall be entitled in the court and cause and in substance as follows:

Form of waiver. "I, ..., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury."

.....
Signature of defendant.

When made. Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel.

SEC. 4. In any case where a defendant waives his right to a trial by jury and elects to be tried by the judge of such court as provided in section three of this chapter any judge of the court in which said cause is pending shall have jurisdiction to proceed with the trial of said cause, and shall proceed to hear, try and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. Jurisdiction of judge.

SEC. 5. No person shall be held to answer on a second charge or indictment for any offense for which he has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him in bar of any subsequent prosecution for the same offense. Acquittal bar to subsequent prosecution.

SEC. 6. If any person who is indicted or informed against for any offense shall on his trial be acquitted upon the grounds of a variance between the indictment or information and the proof or upon any insufficiency or irregularity in the form or substance of the indictment, he may be arraigned again on a new indictment for the same offense, notwithstanding such former acquittal. Arraignment on new indictment.

CHAPTER IV.

Arrest.

SECTION 1. For the apprehension of persons charged with offenses, excepting such offenses as are cognizable by justices of the peace, the justices of the supreme court, the several circuit judges, courts of record having jurisdiction of criminal causes and circuit court commissioners, mayors and recorders of cities and all justices of the peace, shall have power to issue processes to carry into effect the provisions of this chapter. Process, who may issue.

SEC. 2. If any person against whom a warrant shall be issued for an alleged offense committed within any county, shall, either before or after the issuing of such warrant, escape from or be out of the county, the sheriff or other officer to whom such warrant may be directed, may pursue and apprehend the party charged, in any county of this state, and for that purpose may command aid and may exercise the same authority as in his own county. In case of escape.

SEC. 3. A warrant for the arrest of an accused person, when issued by any justice of the peace in any township or city other than the township or city in which the justice of the peace was elected and qualified, may be returned to and the accused brought before such justice of the peace in the city or township in which the offense was committed, or at the office of such justice of the peace in the city or township in which such justice of the peace was elected and qualified: *Provided*, That any such justice of the peace may in such warrant direct that the accused person be brought before another qualified justice of the peace within the same county, Warrant, return of. Proviso.

and in the absence of the justice of the peace who issued the warrant or in case of his inability to attend, the accused person may be brought before another qualified justice of the peace within the same county, which latter justice of the peace may proceed to hear or try the cause and have full jurisdiction thereof.

When arrest made in another county.

SEC. 4. In all cases where the offense charged in the warrant is not punishable with death, or imprisonment in the state prison, and not cognizable by a justice of the peace, if the arrest shall be made in any other county than that where the offense is charged to have been committed, and if the person arrested shall request that he be brought before a magistrate of the county in which the arrest was made, it shall be the duty of the officer or person arresting him to bring such prisoner before a magistrate of that county.

Recognizance.

SEC. 5. Such magistrate may take from the person arrested, a recognizance with sufficient sureties, for his appearance before the magistrate who issued such warrant within twenty days thereafter.

What certified on warrant.

SEC. 6. Such magistrate shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the person who made the arrest, who shall cause the same to be delivered without unnecessary delay to the magistrate or clerk of the court before which the accused was recognized to appear.

When not bailable, etc.

SEC. 7. If such magistrate refuses to let to bail the person so arrested and brought before him, or if no sufficient bail be offered or the offense be not bailable by such magistrate, the person having him in charge shall take him before the magistrate who issued the warrant, or before some other magistrate of the same county, as in the next section prescribed.

When offense not cognizable by justice.

SEC. 8. Persons arrested under any warrant issued for any offense not cognizable by a justice of the peace, shall where no provision is otherwise made, be brought before the magistrate who issued the warrant; or if he be absent or unable to attend, before some other magistrate of the same county; and the warrant, with a proper return thereon, signed by the person who made the arrest, shall be delivered to the magistrate.

When cognizable by justices.

SEC. 9. In all cases where the offense charged in the warrant is cognizable by a justice of the peace, if the arrest shall be made in another county than where the offense is charged to have been committed and if the person arrested shall request that he be brought before a magistrate of the county in which the arrest was made, it shall be the duty of the person or officer arresting him, to carry such prisoner before a magistrate of that county.

May take recognizance.

SEC. 10. Such magistrate may take from the person arrested a recognizance with sufficient sureties for his appearance before the magistrate having cognizance of the offense

within twenty days thereafter, and the person arrested shall thereupon be liberated.

What to certify on warrant.

SEC. 11. Such magistrate shall certify on the warrant the fact of his having let the defendant to bail and shall deliver the same, together with the recognizance taken by him, to the person who made the arrest, who shall cause the same to be delivered without unnecessary delay to the magistrate or clerk of the court before which the accused was recognized to appear.

When bail insufficient.

SEC. 12. If such magistrate determines that no sufficient bail has been offered, he shall make a note of the same in his records and the person having the person arrested in charge shall take him before the magistrate who issued the warrant or before some other magistrate of the same county, as hereinbefore provided.

Arrest without warrant.

SEC. 13. A peace officer who has arrested a person without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested.

Arrest by private person.

SEC. 14. A private person who has made an arrest must without unnecessary delay, take the person arrested before the most convenient magistrate in the county in which the offense was committed or deliver him to a peace officer, who must without unnecessary delay take him before such magistrate. The peace officer or private person so taking the person arrested before such magistrate must lay before the magistrate a complaint stating the offense for which the person was arrested.

Arrest without warrant, when may make.

SEC. 15. Any peace officer may, without a warrant, arrest a person—

(a) For the commission of any felony or misdemeanor committed in his presence;

(b) When such person has committed a felony although not in the presence of the officer;

(c) When a felony in fact has been committed and he has reasonable cause to believe that such person has committed it;

(d) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it;

(e) When he has received positive information by written, telegraphic or other authoritative source that another officer holds a warrant for such arrest.

Arrest, when private person may make.

SEC. 16. A private person may make an arrest—

(a) For a felony committed in his presence;

(b) When the person to be arrested has committed a felony although not in his presence;

(c) When summoned by any peace officer to assist said officer in making an arrest.

When may make.

SEC. 17. An arrest may be made on any day at any time of the day or night.

When arrest made under warrant.

SEC. 18. Where an arrest is made under a warrant, it shall not be necessary for the arresting officer personally to have the warrant in his possession but such officer must, if possible, inform the person arrested that there is a warrant for his arrest and, after the arrest is made, shall show such person said warrant if required, as soon as practicable.

Duty of officer arresting without warrant.

SEC. 19. When arresting a person, without a warrant, the officer making the arrest shall inform the person arrested of his authority and the cause of the arrest, except when the person arrested is engaged in the commission of a criminal offense, or if he flees or if he forcibly resists arrest before the officer has time to inform him. The return of the officer making the arrest, endorsed upon the warrant upon which the accused person shall be subsequently held, affirming compliance with the provisions herein, shall be prima facie evidence of the fact in the trial of any criminal cause.

Duty of private person before making arrest.

SEC. 20. A private person, before making an arrest, shall inform the person to be arrested of the intention to arrest him and the cause of the arrest, except when he is then engaged in the commission of a criminal offense, or if he flees or forcibly resists arrest before the person making the arrest has opportunity so to inform him.

When may break open door.

SEC. 21. To make an arrest, a private person, if the offense be a felony committed in his presence, or a peace officer with a warrant or in cases of felony when authorized without a warrant, may break open an inner or outer door of any building in which the person to be arrested is or is reasonably believed to be if, after he has announced his purpose, he is refused admittance.

Idem.

SEC. 22. A peace officer or private person who has lawfully entered a building for the purpose of making an arrest, may break open a door or window of the building if detained therein, when necessary for the purpose of liberating himself and an officer may also do the same when necessary for the purpose of liberating a person who lawfully entered the building for the purpose of making an arrest and is detained therein.

May pursue and rearrest escaped person.

SEC. 23. If a person lawfully arrested escape or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time and in any place within the state without a warrant.

Means employed.

SEC. 24. To retake the person escaping or rescued, the person pursuing may use the same means to retake as are authorized for an arrest.

Weapons, etc., taken.

SEC. 25. Any person making an arrest shall take from the person arrested, all offensive weapons or incriminating articles which he may have about his person and must deliver them to the sheriff of the county, chief of police of the city or to the magistrate before whom he is taken.

Person charged with felony.

SEC. 26. Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer.

Arrest of child under seventeen.

SEC. 27. Whenever any child under the age of seventeen years is arrested with or without a warrant, such child shall be taken immediately before the juvenile division of the probate court, and the officer making the arrest shall immediately make and file or cause to be made and filed, a petition against such child as provided by act number six of the public acts of nineteen hundred seven, extra session, as amended; and the said court shall proceed to hear and determine the matter in like manner as provided by said act, as amended. If, during the pendency of any criminal case against any child in any court in this state having criminal jurisdiction, it shall be ascertained that said child is under the age of seventeen years, it shall be the duty of the court before whom such case is pending to immediately transfer such case, together with all papers connected therewith to the juvenile division of the probate court: *Provided, however,* That in any case where a child over the age of fifteen years is charged with a felony the judge of probate may, after investigation and examination, and upon motion of the prosecuting attorney, waive jurisdiction; whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offenses.

Proviso, child over fifteen.

When court to issue capias.

SEC. 28. When any person under recognizance on an appeal in a criminal proceeding from a conviction and judgment of a justice of the peace, shall not appear according to the condition of such recognizance, and the said recognizance shall have become forfeited by reason of the breach of the condition thereof, and such forfeiture shall have been entered on record by order of the circuit court, it shall be lawful for said court to issue a capias for the arrest of the appellant or defendant named in such recognizance, to bring him before the court to answer to the complaint or prosecution against him in the proceedings in which appeal was taken.

CHAPTER V.

Bail.

When admitted to bail.

SECTION 1. Officers before whom persons charged with crime shall be brought, shall have power to let them to bail as follows:

(a) Any justice of the supreme court, judge of a circuit court, judge of any court of record having jurisdiction of criminal causes, circuit court commissioners, in all cases except for offenses enumerated in section five of this chapter;

(b) Any justice of the peace, judge of a police or municipal court, mayor of a city, in all cases where the punishment for the offense charged shall be less than imprisonment for life in the state prison.

Recorder's, etc., courts.

SEC. 2. The several circuit courts, the Recorder's court of the city of Detroit, the Superior court of the city of Grand Rapids, and all courts of record having jurisdiction over criminal causes, shall have power to let to bail any person committed, in all cases in which a justice of the supreme court is authorized to let such person to bail.

Justice of supreme court, etc.

SEC. 3. Any justice of the supreme court, circuit court commissioner or any judge of any circuit court for any county, or of the Recorder's court of the city of Detroit or the Superior court of the city of Grand Rapids or of any court of record having jurisdiction of criminal causes, on application of any prisoner committed for any bailable offense, and after due notice to the prosecuting attorney for the county, may inquire into the case and admit such prisoner to bail; and any person committed for not finding such sureties to recognize for him, may be admitted to bail by any of the said officers.

Commitment, etc.

SEC. 4. Any person who may, according to law, be committed to jail or become recognized or held to bail with sureties for his appearance in court to answer to any indictment may, in like manner so be committed to jail, or become recognized and held to bail for his appearance, to answer to any information or indictment as the case may be.

Who not bailable.

SEC. 5. No person charged with treason or murder shall be admitted to bail if the proof of his guilt is evident or the presumption great.

Recognizance, amount of.

SEC. 6. In all other cases the person accused shall be entitled to bail. The amount of the recognizance shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant and the probability or improbability of his appearing at the trial of the cause.

Writ of error.

SEC. 7. In all cases where a writ of error shall be taken by or on behalf of the people of the state of Michigan from any court of record to the supreme court, the defendant shall be admitted to bail on his own recognizance, pending the prosecution and determination of said writ; unless the trial court shall determine and certify that the character of the offense, of the respondent and of the questions involved in such review, render it advisable that bail be required.

Attorney not to be surety.

SEC. 8. No practicing attorney or counselor shall become security or bail for the appearance of any person charged with a felony or a misdemeanor in any criminal action and any such surety or bail for appearance taken by a judge, circuit court commissioner, justice of the peace or other officer authorized by law to take security or bail, shall be void.

When surety not accepted.

SEC. 9. Any magistrate or judge of any court shall have authority in his discretion to refuse to accept as surety upon

a bond any person who shall, at the time of so offering himself, be acting as surety on any other bond pending in his court.

How taken and entered.

SEC. 10. All recognizances for the appearance of offenders in the several municipal courts of this state, to answer for offenses committed against the by-laws and ordinances of any municipal corporation, may be taken and entered into by and before the clerks of said courts: *Provided, however,* That if the party or parties becoming recognized shall not be satisfied with the sum fixed therein by the clerk, the same shall be fixed by the judge of the court, if demanded by the party or parties becoming recognized.

Proviso.

Cash in lieu of bond.

SEC. 11. When under the laws of this state any bond is required in any cause, in any justice court in this state, it shall be lawful for the party from whom such bond is required to deposit cash in lieu thereof. Such security shall be taken and accepted by the justice of the peace and be forfeited or discharged in the same manner as the bond required.

Certified check, etc.

SEC. 12. In any criminal cause or proceeding where bond or bail of any character is required or permitted for any purpose, the party or parties required or permitted to furnish such bail or bond may deposit, in lieu thereof, in the manner herein provided, cash, certified check on any state or national bank in this state, obligations of the United States government negotiable by delivery or bonds of any municipality of this state negotiable by delivery, equal in amount to the amount of the bond or bail so required or permitted.

With whom deposited.

SEC. 13. Such cash, check or security shall be deposited with the clerk of the court, if under bond, or with the treasurer of the county, city, village or township within which the bail or bond is to be furnished or, in any case, with the state treasurer. Such treasurer shall accept such cash, check or security and deliver to the depositor thereof a receipt, in duplicate, reciting the fact and purpose of such deposit: *Provided,* That in case such bail or bond be required after the office hours of the treasurer with whom the deposit should be made, such deposit may be made with the officer who has the function of approving the bond or bail or with the sheriff of the county or his deputy in charge of the county jail or sheriff's office, who shall accept the same, give duplicate receipts therefor and cause the cash, check or security to be delivered to the proper treasurer within forty-eight hours thereafter.

Proviso, duplicate receipts.

Effect of filing of.

SEC. 14. The filing of one of such duplicate receipts in the court in which such bond or bail is required or permitted to be filed shall have the same effect as the furnishing of such bond or bail and shall be taken and given effect by such court and its officers in lieu of such bond or bail.

Forfeiture of bond, etc.

SEC. 15. (a) If such bond or bail be forfeited, the court shall enter an order upon its records directing the disposition of such cash, check or security, and the treasurer, upon presentation of a certified copy of such order, shall make disposition thereof in accordance therewith.

Discharge.

(b) If such bond or bail be discharged, the court shall enter an order to that effect with a statement of the amount to be returned to the depositor. Upon presentation of a certified copy of such order, the treasurer having such cash, check or security shall pay or deliver the same to the person named therein or to his order.

Disposition of.

(c) In case such cash, check or security shall be in the hands of the sheriff or any officer, other than such treasurer, at the time it is declared discharged or forfeited, the officer holding the same shall make such disposition thereof as the court shall order, upon presentation of a certified copy of the order of the court.

Not subject to attachment.

SEC. 16. Cash, checks or securities deposited hereunder shall not be subject to garnishment or attachment. No assignment thereof shall be valid unless it be in writing, signed by the depositor, before two witnesses, acknowledged before an officer having authority to take the acknowledgment of deeds, and specifically stating the desired disposition of the whole of the deposit. An assignment made before the order of the court directing the disposition of such cash, check or security shall be contingent upon the discharge of the same and shall not be valid or effective unless and until it is filed with the court having jurisdiction to discharge the bond or bail. No assignment made after the order of the court discharging such bail or bond shall be valid unless it is endorsed upon or attached to the certified copy of the discharge order presented to the treasurer or officer having custody of the cash, check or security. In case one or more assignments be filed with the court before the order discharging the bail or bond, the court shall, in the order, determine the persons to whom such cash shall be paid or securities delivered.

Assignment, when valid.

Where cash, etc., deposited.

SEC. 17. Any cash or securities received by any treasurer under the provisions of this chapter shall be deposited in a special fund or place of deposit subject to the order of the proper court. Any interest accumulating upon such fund shall be paid into the general fund or corresponding fund of the state, county, city, village or township according to the nature of the case or in accordance with the order of the proper court: *Provided, however,* That when bonds or other securities are deposited the interest coupons shall not be detached therefrom but shall follow the disposition of the securities.

Proviso.

Redemption of.

SEC. 18. Any person, firm or corporation availing himself or itself of the provisions of this chapter may, at any time before forfeiture of the same, redeem any cash or securities so deposited by substituting the bond originally required or permitted.

Provisions not repealed.

SEC. 19. Nothing in this chapter shall be construed to repeal any of the provisions of act number three hundred thirty-two of the public acts of nineteen hundred nineteen, so far as the same may apply to commissions or bodies other than courts having jurisdiction of criminal cases.

Oath to surety, who to administer.

Pledge of real estate.

Affidavit of justification.

SEC. 20. In every court in this state having criminal jurisdiction, each judge thereof shall have power in his discretion to administer an oath to any proposed surety upon any recognizance given for the release of a person accused of any crime, offense, misdemeanor or violation of any city or village ordinance, to ascertain his financial condition. Each of the judges of any such court shall have power in his discretion to require any surety upon any criminal recognizance taken before him, to pledge to the people of the state of Michigan, real estate owned by said surety and located in the county in which such court is established, the value of the interest of said surety in said real estate being at least equal to the penal amount of the said recognizance. Whenever such a pledge of real estate shall be required by any such court or by any of the judges thereof, of any proposed surety, there shall be executed by said surety the usual form of recognizance and in addition there shall be included in said recognizance, as a part thereof, an affidavit of justification in substantially the following form. Such affidavit shall be executed by the proposed surety under an oath administered by the clerk or any judge of said court.

STATE OF MICHIGAN }
COUNTY OF.....} ss:

.....residing at.....who offers himself as surety for.....being first duly sworn, deposes and says that he owns in his own right real estate subject to levy of execution located in the county of..... state of Michigan, consisting of..... and described as follows, to-wit:.....; that the title to the same is in his name only; that the value of the same is not less than $.....and is subject to no encumbrances whatever except..... mortgage of $.....; that he is not surety upon any unpaid or forfeited recognizance and that he is not party to any unsatisfied judgment upon any recognizance; that he is worth in good property not less than $..... over and above all debts, liabilities and lawful claims against him and all liens, encumbrances and lawful claims against his property.

.....

Subscribed and sworn to before me this .....day of.....19....

.....

Judge of the court of the city of.....
county

Each of the judges of any such court may, in his discretion and in addition to the above affidavit, require the proposed surety to depose under oath that he is not at the time of executing said recognizance and affidavit surety upon any other recognizance and that there are no unsatisfied judg-

ments or executions against him. Each of the judges of any such court may, in his discretion, require such proposed surety to depose to any other fact which is relevant and material to a correct determination of the proposed surety's sufficiency to act as bail: *Provided*, That no lien upon real estate shall be required for any offense cognizable by a justice of the peace.

Proviso.

Lien.

SEC. 21. Upon the execution of any recognizance in the usual form and an affidavit of justification containing a description of real estate there shall immediately attach to the said real estate, described in said affidavit of justification, a lien in favor of the people of the state of Michigan in the penal amount of the recognizance, which lien shall remain in full force and effect during the time that said recognizance remains effective, or until the further order of said court.

Recognizance, where filed.

Upon the acceptance by any of the judges of any such court of a recognizance in the usual form containing the above described affidavit of justification, and description of real estate, the said recognizance shall be immediately filed with the clerk of such court. The clerk of such court shall forthwith upon the filing with him of said recognizance, file with the register of deeds of the county in which said real estate is located, a notice of lien in writing in substantially the following form:

Notice of lien.

Form of.

To Whom It May Concern:

TAKE NOTICE that the hereinafter described real estate located in the county of.....has been pledged for the sum of.....dollars ($...) to the people of the state of Michigan, by.....surety upon the recognizance of.....in a certain cause pending in.....court for the city of.....
county
to-wit:
People of the state of Michigan, Plaintiff, vs. .....
Defendant, known and identified in said court as Cause No. .....

Description of Real Estate.

.....
.....
.....
.....
city Clerk of the.....Court.
For the county of.....
Dated.....

Said notice of lien, when filed, shall constitute notice to everyone that the real estate therein described has been pledged to the people of the state of Michigan as security for the performance of the conditions of a criminal recognizance, in the penal amount set forth in said recognizance.

Cancellation, etc.

SEC. 22. Whenever by the order of such court a recognizance in the above form shall have been cancelled, dis-

charged or set aside, or the cause in which said recognizance is given shall have been dismissed, the clerk of such court shall forthwith file with the register of deeds of the county in which the real estate is located, a notice of discharge in writing in substantially the following form: Notice of discharge, form of

To Whom It May Concern:

TAKE NOTICE that by the order of the.....
of the city
county of.....the recognizance of.....
as principal and.....as surety, given in the cause of the people of the state of Michigan, Plaintiff, vs.....
.....Defendant, known and identified as Cause No..... in said court, is cancelled, discharged and set aside and the lien of the people of the state of Michigan to the real estate therein pledged as security is hereby waived, discharged and set aside.

Description of Real Estate.

.....
.....
.....
.....
Clerk of the.....Court.

For the city
county of .....
Dated.....

SEC. 23. The register of deeds of the county in which such court is located shall properly keep and file all such notices of lien and notices of discharge as hereinbefore provided as may be filed with him, and shall keep in addition thereto a book or record in which he shall properly index such notice of lien and notices of discharge as may be filed with him. In counties in which the register of deeds is compensated on the basis of fees collected, such register shall receive from the people, such fees as are provided by law for such service. Filing, etc., notices of liens, etc.

SEC. 24. Nothing in this chapter shall be construed as limiting or qualifying in any way the power of any such courts or any of the judges thereof to release any accused person upon his personal recognizance, or upon a recognizance executed by a surety in accordance with the provisions of act number two hundred twenty-nine of the public acts of nineteen hundred twenty-three, or upon the deposit with the clerk of such court of any cash bail or other security in accordance with the provisions of section six of act number three hundred sixty-nine, of the public acts of nineteen hundred nineteen. Whenever such surety deposits with the clerk of such court the penal amount of such recognizance in cash or in other security satisfactory to such court, an order shall issue releasing the lien on the real estate. Nothing in this act shall be construed as qualifying or in any way changing the usual Power not limited. When lien released.

and legal and existing procedure of collecting upon forfeited recognizances, as provided by law.

Perjury, what deemed.

SEC. 25. Any surety who shall swear falsely to any of the material facts set up in his affidavit of justification shall be deemed guilty of perjury and upon conviction thereof, shall be punished in accordance with the law in such case made and provided.

When surety released.

SEC. 26. In all criminal cases where any person or persons have entered into any recognizance for the personal appearance of another and such bail and surety shall afterwards desire to be relieved from his responsibility, he may with or without assistance, arrest the accused and deliver him at the jail or to the sheriff of said county. In making such arrest he shall be entitled to the assistance of the sheriff, chief of police of any city or any peace officer. The sheriff or keeper of any jail in said county is authorized to receive such principal and detain him in jail until he is discharged in due course of law. Upon delivery of his principal at the jail by the surety or any officer, such surety shall be released from the conditions of his recognizance. Whenever the prosecuting attorney of any county shall become satisfied that any person who has been recognized to appear for trial has absconded, or is about to abscond, and that his sureties or either of them have become worthless, or are about to dispose or have disposed of their property for the purpose of evading the payment or the obligation of such bond or recognizance, or with intent to defraud their creditors, and such prosecuting attorney shall make a satisfactory showing to this effect to the court having jurisdiction of such person, said court or judge shall forthwith grant a mittimus to the sheriff or any constable of said county, commanding him forthwith to arrest the person so recognized and bring him before the officer issuing such mittimus, and on the return of said mittimus may, after a full hearing on the merits, order him to be recommitted to the county jail until such time as he shall give additional and satisfactory sureties, or be otherwise discharged according to law.

Mittimus to sheriff, when granted.

Action not barred.

SEC. 27. No action brought upon any recognizance entered into in any criminal prosecution, either to appear and answer, or to testify in any court, shall be barred or defeated nor shall judgment thereon be arrested, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, nor by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or a magistrate before whom it was taken was authorized by law to require and take such recognizance.

When default made.

SEC. 28. In addition to any other method available, it is hereby provided that whenever default shall be made in any recognizance in any court of record, the same shall be duly entered of record by the clerk of said court and thereafter

said court, upon the motion of the attorney general, prosecuting attorney or city attorney, may give the surety or sureties twenty days' notice, which notice shall be served upon said surety or sureties in person or left at his or their last known place of residence. Said surety or sureties shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against him or them for the full amount of such recognizance. If good cause is not shown, the court shall then enter judgment against the surety or sureties on said recognizance for such amount as it may see fit not exceeding the full amount thereof. Execution shall be awarded and executed upon said judgment in like manner as is provided in personal actions.

Bail for appearance not required.

SEC. 29. It shall not be necessary in any criminal case for any witness to give bail for his appearance as a witness in such cause unless required to do so by the order of a judge of a court of record or a circuit court commissioner; all laws contravening this section are hereby repealed.

When minor, etc., witness.

SEC. 30. When any married woman or minor is a material witness, any other person may be allowed to recognize for the appearance of such witness.

CHAPTER VI.

Examination of Offenders.

Final determination without delay.

SECTION 1. The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination.

Examination of complainant, etc.

SEC. 2. Whenever complaint shall be made to any magistrate named in section one, chapter four, of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him.

Warrant, when issued.

SEC. 3. If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein.

Examination.

SEC. 4. The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten days thereafter, at which time he shall examine

the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent.

When prisoner discharged.

SEC. 5. If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial.

Associate magistrates.

SEC. 6. Any magistrate to whom complaint is made, or before whom any prisoner is brought, may associate with himself one or more other magistrates of the same county, and they may together execute the powers and duties conferred upon such magistrates respectively by this chapter, but no fees shall be taxed for such associates.

Adjournment.

SEC. 7. Any magistrate may adjourn an examination for an offense not cognizable by him if the same be necessary, to the same or a different place in the county as such magistrate shall deem necessary; and in such case the accused may in the meantime be committed either to the county jail or to the custody of the officer by whom he was arrested or to any other officer; or, unless he shall be charged with treason or murder, he may be recognized in a sum and with sureties to the satisfaction of the magistrate, for his appearance before such magistrate for further examination:

Proviso.

Provided, That no adjournments, continuances or delays of such examination shall be granted by such magistrate except

Further proviso.

for good cause shown: And *provided further,* That no magistrate shall adjourn, continue or delay the examination of any cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of said cause cannot then be had, or a manifest injustice will be done. No action on the part of the magistrate in adjourning or continuing any case, shall cause said magistrate to lose jurisdiction of said case.

Commitment.

SEC. 8. The person accused may be committed as provided in the preceding section, by the verbal order of the magistrate, or by a warrant under his hand, stating that he is committed for such further examination on a day to be named in the warrant; and on the day therein specified, he may be brought before the magistrate by his verbal order to the same officer by or to whose custody he was committed, or by an order in writing to a different officer.

Persons excluded.

SEC. 9. On the preliminary examination of every person charged with the offense of rape, assault with intent to commit rape, seduction, adultery, bastardy or other offense

against chastity, morality or decency, it shall be in the discretion of the examining magistrate to exclude from the place where such examination is held, any or all persons not officers of the court, or persons by law required to be in attendance.

May exclude witness not examined.

SEC. 10. The magistrate while conducting such examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined. And such magistrate may in his discretion, also exclude from the place of examination any or all minors during the examination of such witnesses.

Witnesses subpoenaed.

SEC. 11. Witnesses may be compelled to appear before such magistrate by subpoenas issued by him, or by any officer or court authorized to issue subpoenas, in the same manner and with the like effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace; and the evidence given by the witnesses examined shall be reduced to writing by such magistrate, or under his direction and shall be signed by the witnesses respectively: *Provided*, That unless otherwise provided by law, the evidence so given shall be taken down in shorthand by a county stenographer where one has been appointed under the provision of any local act of the legislature or by the board of supervisors of the county wherein such examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of said county with the consent of the respondent or his attorney to act as official stenographer pro tem. for the court of such magistrate to take down in shorthand the testimony of any such examination, and any stenographer so appointed shall take the constitutional oath as such official stenographer and shall be entitled to the following fees: Six dollars for each day and three dollars for each half day while so employed in taking down such testimony and ten cents per folio for typewriting such testimony so taken down in shorthand and the same may be allowed and paid out of the treasury of the county in which such testimony is taken: *Provided further*, That it shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by such stenographer above provided, to sign such testimony but any witness or witnesses shall have the right to have such testimony read to them upon their request. Such testimony, after being typewritten, shall be received and filed in the court to which the accused is held for trial without the signature of such witness or witnesses for the same purpose and with like effect as the testimony of witnesses hereinabove provided, which is signed by such witness or witnesses and such testimony so

Proviso, evidence taken in shorthand.

Stenographer's fees.

Further proviso.

taken shall be considered prima facie evidence of the testimony of such witness or witnesses at such examination.

Witnesses sworn, etc.

SEC. 12. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution.

When defendant discharged.

SEC. 13. If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial.

When accused not dismissed.

SEC. 14. If, upon the examination of a person charged with a felony or an offense not cognizable by a justice of the peace, it shall appear that the offense charged is not a felony or is an offense cognizable by a justice of the peace, the accused shall not be dismissed but the magistrate shall proceed, as soon as possible, to the trial of said accused in the same manner as if he had been charged with the misdemeanor or offense cognizable by a justice of the peace.

Examinations, etc., certified.

SEC. 15. All examinations and recognizances taken by any magistrate pursuant to any of the provisions of this chapter, shall be forthwith certified and returned by him to the clerk of the court before which the party charged is bound to appear, and if such magistrate shall refuse or neglect to return the same, he may be compelled forthwith by rule of the court, and in case of disobedience he may be proceeded against by attachment as for a contempt.

Failure to appear.

SEC. 16. If the person recognized according to the provisions of this chapter shall not appear before the magistrate at the time appointed for his further examination, the magistrate shall record the default, and shall certify the recognizance, with the record of such default, to the court to which the accused might otherwise have been held for trial, and the like proceedings shall be had thereon as upon the breach of the condition of a recognizance for appearance before such court.

When prisoner discharged.

SEC. 17. Whenever no sufficient bail is offered, and the prisoner is committed to jail, the magistrate before whom the examination was had, shall certify upon the mittimus issued by him, the sum for which bail was required, and if the prisoner shall offer sufficient bail for such sum to the clerk of the court wherein the prisoner was committed for trial, it shall be taken by said clerk and the prisoner shall be discharged.

When bail taken.

SEC. 18. The clerk of the court to whom such bail is offered, is authorized and required to examine the person or persons offered for bail on oath as to their pecuniary responsibility, and if he shall be satisfied with the same, to take bail and certify and return the recognizance in the same manner and to the same effect as the magistrate might have done.

When accused discharged.

SEC. 19. When any person brought before a justice of the peace shall be committed to jail, or shall be under recognizance to answer to any charge of assault and battery or other misdemeanor for which the injured party shall have a remedy by civil action, if the injured party shall appear before the magistrate having cognizance of the offense, who made the commitment or took the recognizance, and acknowledge in writing that he has received satisfaction for the injury, the magistrate may in his discretion, on payment of the costs which have accrued, discharge the accused and the recognizance, or supersede the commitment by an order under his hand.

Order discharging recognizance, where filed.

SEC. 20. Every such order discharging any recognizance, shall be filed in the office of the clerk of the proper court; and every such order superseding the commitment of the offender, shall be delivered to the keeper of the jail where he shall be confined, who shall forthwith discharge him; and every such order, if so filed and delivered, and not otherwise, shall forever bar all remedy by civil action for such injury.

Stay of proceedings.

SEC. 21. If an indictment shall be found on any such charge, the injured party may in like manner appear in the court where such indictment is pending and acknowledge satisfaction for the injury and damages sustained by him; and such court may in its discretion, on payment of the costs incurred, order that no further proceedings be had on such indictment, and may discharge the defendant therefrom; which order shall operate as a perpetual stay of all further proceedings on such indictment.

When not applicable.

SEC. 22. The provisions of the last three sections shall not extend to any charge or indictment for any assault and battery or other misdemeanor charged to have been committed riotously or with intent to commit a felony or upon any public officer while in the execution of the duties of his office.

CHAPTER VII.

Grand Juries, Indictments, Informations and Proceedings Before Trial.

Jurisdiction, etc., of courts.

SECTION 1. The several circuit courts of this state, the recorders' courts and any court of record having jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon informations for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments.

Provisions applicable to informations.

SEC. 2. All provisions of the law applying to prosecutions upon indictments, to writs and process therein and the issuing and service thereof, to commitments, bail, motions, pleadings, trials, appeals and punishments, or the execution of any sentence, and to all other proceedings in cases of indictments whether in the court of original or appellate jurisdiction, shall, in the same manner and to the same extent as near as may be, be applied to informations and all prosecutions and proceedings thereon.

When required to attend as witness.

SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

Apprehension.

SEC. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may,

Finding of judge.

Basis for removal.

at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

When guilty of contempt.

SEC. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding sixty days or both at the discretion of the court: *Provided,* That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

Proviso.

Incriminating answers not required.

SEC. 6. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

Grand juries, when not drawn.

SEC. 7. Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court.

When juror discharged.

SEC. 8. Any court in which a grand jury may be sitting, may discharge any of the grand jurors for intoxication or other gross misconduct; and in case of such discharge, or in case of the sickness, death or non-attendance of any grand juror, after he shall have been sworn, the court may cause another juror to be summoned from among the bystanders, or inhabitants of the city, township or village having the qualifications required by law, and to be sworn and to serve in his stead.

Oath administered to jurors.

SEC. 9. The clerk of the court shall prepare an alphabetical list of all the persons returned as grand jurors, and when the jury is to be impaneled, the following oath shall be administered to them: "You as grand jurors of this inquest, for the body of this county of.....do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God".

May affirm.

SEC. 10. Any person returned as a grand juror shall be allowed to make affirmation, substituting the word "affirm" instead of the word "swear"; and also the words, "this you do under the pains and penalties of perjury", instead of the words "so help you God".

Number sworn.

SEC. 11. There shall not be less than sixteen persons sworn on any grand jury; and after such jurors have been impaneled and have received their charge from the court, they shall retire with the officer appointed to attend them and before they proceed to discharge the duties of their office, the court shall appoint one of their number to be foreman and the clerk shall record the same.

Foreman.

SEC. 12. The foreman appointed by the court in the manner provided in the preceding section, shall be foreman during the whole time they are required to serve; but in case of his death or absence or if he shall be discharged, or excused before the grand jury shall be dismissed, another of such jurors shall be appointed foreman for the residue of such time of service.

When not summoned.

SEC. 13. A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside.

Challenges.

SEC. 14. No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section.

Oaths, who may administer.

SEC. 15. The foreman of every grand jury, the attorney general and the prosecuting attorney, or other prosecuting officer who shall be before them, shall have authority to administer all oaths and affirmations, in the manner prescribed by law, to witnesses who shall appear before such jury for the purpose of testifying in any matter of which they may have cognizance, and the foreman shall return to the court, or deliver to the prosecuting officer, a list of all the witnesses sworn before the grand jury in each case in which an indictment shall be found.

Clerk, who to appoint.

SEC. 16. The grand jury may appoint one of their number to be their clerk, to preserve minutes of their proceedings and of evidence given before them; which minutes shall be delivered to the prosecuting officer, when so directed by the grand jury. Whenever it appears to the judge that it is necessary he may appoint a stenographer to take the testimony given before the grand jury.

Summoning after dismissal.

SEC. 17. When the grand jury attending any court shall have been dismissed before the court is adjourned without day, they may be summoned to attend again, in the same term at such time as the court shall direct, for the dispatch of any business that may come before them.

Indictment for felony.

SEC. 18. No grand juror, stenographer or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under

recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested.

Grand jurors required to testify.

SEC. 19. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon complaint against such person for perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

Prosecuting attorney to advise grand jury.

SEC. 20. Whenever required by the grand jury, it shall be the duty of the prosecuting attorney of the county to attend them for the purpose of examining witnesses in their presence or of giving them advice upon any legal matter.

Who may issue subpoenas.

SEC. 21. The prosecuting attorney and other prosecuting officers, may, in all cases, issue subpoenas for witnesses to appear and testify on behalf of the people of this state; and the subpoena, under the hand of such officer, shall have the same force and be obeyed in the same manner and under the same penalties, as if issued by the clerk or any magistrate.

Prosecutor may appear before grand jury.

SEC. 22. The prosecuting attorney of the county, or other prosecuting officer, shall be allowed at all times to appear before the grand jury, on his request, for the purpose of giving information relative to any matter cognizable by them; but no prosecuting officer, constable or any other person, except grand jurors, shall be present during the expression of their opinions, or the giving of their votes upon any matter before them.

When indictment found.

SEC. 23. No indictment can be found without the concurrence of at least twelve grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill.

Indictments, when found.

SEC. 24. An indictment for the crime of murder may be found at any period after the death of the person alleged to have been murdered; all other indictments shall be found and filed within six years after the commission of the offense; but any period during which the party charged was not usually and publicly resident within this state shall not be reckoned as part of the six years.

How presented.

SEC. 25. Indictments found by a grand jury, with the names of the complainant and all the witnesses indorsed on the back thereof, shall be presented by their foreman, in their presence, to the court, and shall there be filed and remain as public records; but such as are found against any person for a felony, not being in actual confinement, shall not be open to the inspection of any person except the attorney general or prosecuting attorney until the defendant therein shall have been arrested.

When accused discharged.

SEC. 26. Any person held in prison on any charge of having committed a crime, shall be discharged if he be not indicted before the end of the second term of the court at which he is held to answer unless it shall appear to the satisfaction of the court that the witnesses on the part of the people have been enticed or kept away, or are detained and prevented from attending the court by sickness or some inevitable accident, and except in the case provided for in the next section.

When accused insane.

SEC. 27. When a person accused of the crime of murder, attempt at murder, rape, attempt at rape, incest, abduction, highway robbery or arson, or attempt to do great bodily harm, shall appear to be insane or shall have escaped indictment upon the grounds of insanity or shall have been acquitted upon trial upon the grounds of insanity, the court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain as herein provided whether his insanity in any degree continues, and if it does, shall order such person into safe custody and to be sent to the Ionia state hospital. When any person in confinement under indictment for the crime of arson, or murder, or attempt at murder, rape or attempt at rape, or incest or abduction, or highway robbery, or assault to do great bodily harm, shall appear to be insane, the judge of the circuit court or other court of record having jurisdiction of criminal causes of the county where he is confined shall institute a careful investigation. He shall call two or more reputable physicians and other credible witnesses, and the prosecuting attorney, to aid in the examination and if it be deemed necessary to call a jury for that purpose, is fully empowered to compel the attendance of witnesses and jurors. If it is satisfactorily proved that such person is insane, said judge may discharge such person from imprisonment and order his safe custody and removal to the Ionia state hospital, where such person shall remain until restored to his right mind and then, if the said judge shall have so directed, the superintendent of said hospital shall inform the said judge and prosecuting attorney, so that the person so confined may within sixty days thereafter he remanded to prison and criminal proceedings be resumed, or he be otherwise discharged. If any such person be sent to said hospital, the county from which he is sent shall defray all expenses of such person while at the hospital for a period of two years, and the expense of returning home to such county if his discharge is effected during such period. If he shall not be discharged from said hospital until after his transfer to the state shall have been effected, under the provision of chapter fifty of the compiled laws of nineteen hundred fifteen, the expenses of his return to said county shall be paid by the state of Michigan. The county or state may recover the amount so paid from the person's own estate, if he have any, or from any relative, town, city, or county that would have

Examination.

When removed to hospital.

Expense, who to defray.

been bound under existing laws to provide for and maintain him elsewhere.

Who entitled to copy of indictment.

SEC. 28. Every person indicted for any offense, who shall have been arrested upon process issued upon such indictment or who shall have duly entered into recognizance to appear and answer to such indictment shall, on demand, be entitled to a copy of the indictment and of all endorsements thereon.

When nolle prosequi not entered.

SEC. 29. It shall not hereafter be lawful for any prosecuting attorney to enter a nolle prosequi upon any indictment, or in any other way to discontinue or abandon the same, without the leave of the court having jurisdiction to try the offense charged, entered in its minutes.

Warrant, when may issue.

SEC. 30. A warrant for the arrest of any person indicted may be issued by the court to which the indictment shall be presented, or by any justice of the supreme court, or judge of the court for the county in which such indictment shall be found, or judge of any recorder's court or any court of record having jurisdiction of criminal causes, either in vacation or during the sitting of any such court; but such warrant shall not be issued by any other officer.

To whom directed.

SEC. 31. Every warrant shall be directed to the sheriff, constable, police officer or peace officer of the county in which the indictment shall be found, and may be executed in any part of this state.

Subpoenas.

SEC. 32. The clerk of any county in which an indictment shall be found, upon the application of the defendant, and without requiring any fees, shall issue subpoenas as well during the sitting of any court as in vacation, for such witnesses as the defendant may require, whether residing in or out of the county.

Disobedience to subpoena.

SEC. 33. Disobedience to any subpoena issued pursuant to the foregoing provisions, shall be punished in the same manner and upon the like proceedings, as provided by law in other cases; and the person guilty of such disobedience shall be liable to the party at whose instance such subpoena issued in the same manner and to the like extent as in cases of subpoenas issued in any civil suit.

Capiases, when may issue.

SEC. 34. Any circuit court or any court of record shall have power to issue capiases, in the first instance, for any witness or witnesses in criminal cases, when it shall satisfactorily appear that such witness or witnesses are material and that there will be danger of the loss of their testimony unless such writ be issued.

Witness, when required to appear.

SEC. 35. Whenever it shall appear to any court of record that any person is a material witness in any criminal case pending in any court in the county and that there is danger of the loss of testimony of such witness unless he be required to furnish bail or be committed in the event that he fails to furnish such bail, said court, or a circuit court commissioner in the absence of a judge of any court of record, shall require such witness to be brought before him and after giving him an opportunity to be heard, if it shall appear that such witness

is a material witness and that there is danger of the loss of his testimony unless he furnish bail or be committed, said court may require such witness to enter into a recognizance with such sureties and in such amount as the court may determine for his appearance at any examination or trial of said cause. All witnesses who fail to so recognize, shall be committed to jail by said court, there to remain until they comply with such order or are discharged by future order of said court.

May require recognizance.

Unnecessary to tender fees.

SEC. 36. It shall not be necessary to pay or tender any fees whatever to any witness subpoenaed on the part of the people of this state in support of any prosecution, but such witness shall be bound to attend as if the fees allowed by law to witnesses in civil actions had been duly paid to him.

When plea of not guilty entered.

SEC. 37. When any person shall be arraigned upon an indictment, it shall not be necessary in any case to ask him how he will be tried; but if, on being so arraigned, he shall refuse to plead or answer or shall not confess the indictment to be true, the court shall order a plea of not guilty to be entered and thereupon the proceedings shall be the same as if he had pleaded not guilty to the indictment.

When tried.

SEC. 38. Every person held in prison upon an indictment shall, if he require it, be tried at the next term of court after the expiration of six months from the time when he was imprisoned, or shall be bailed upon his own recognizance, unless it shall appear to the satisfaction of the court that the witnesses on behalf of the people have been enticed or kept away, or are detained and prevented from attending court by sickness, or some inevitable accident.

Who may be tried, etc.

SEC. 39. Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Informations, when filed.

SEC. 40. All informations shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate by the prosecuting attorney of the county as informant; he shall subscribe his name thereto, verify the same under his oath and indorse thereon the names of the witnesses known to him at the time of filing the same. Names of other witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine.

Witnesses indorsed.

Duty of prosecuting attorney.

SEC. 41. It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense whereon the offender shall be committed to jail or become recognized or held to bail; and if the prosecuting attorney shall determine in any case that an information ought not to be filed, he shall make, sub-

scribe and file with the clerk of the court a statement, in writing, containing his reasons in fact and in law, for not filing an information in such case and that such statement shall be filed at and during the term of the court at which the offender shall be held for appearance: *Provided,* That in such case such court may examine said statement, together with the evidence filed in the case and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial. Proviso.

Preliminary examination.

SEC. 42. No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: *Provided, however,* That informations may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed, may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed. Proviso.

Form of Indictment.

SEC. 43. The indictment may be substantially in the following form:

In the.....(here give the name of the court) .....term, 19... the People of the state of Michigan vs. (here give the name or description of the accused.)

The grand jury of the county of.....do present that (here give name or description of the accused), (here set forth the offense and transaction according to the rules herein enunciated).

Forms.

SEC. 44. The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:

Adultery—A. B., a married man, committed adultery with C. D.; or A. B. committed adultery with C. D., a married woman.

Affray—A. B. and C. D. made an affray.

Assault—A. B. assaulted C. D.

Assault and Battery—A. B. committed an assault and battery on C. D.

Assault with intent—A. B. assaulted C. D. with intent to murder, or kill, or rob, or maim, or rape (as the case may be).

Arson—A. B. committed arson by burning the dwelling house of C. D.

Attempt—A. B. attempted to steal from C. D.; A. B. attempted to commit larceny of the goods of C. D.; A. B. attempted to commit burglary of a building belonging to C. D. (as the case may be).

Burglary—A. B. committed burglary of the house of C. D. A. B. broke and entered the dwelling house of C. D. in the night time with intent to commit larceny, or murder, or robbery therein (as the case may be).

Conspiracy—A. B. and C. D. conspired together to murder E. F. or to steal the property of E. F. or to rob E. F. (as the case may be).

Forgery—A. B. forged a certain instrument purporting to be a promissory note (or describe instrument or give its tenor or substance).

Larceny—Embezzlement and false pretenses. A. B. stole from C. D. one horse of the value of more than one hundred dollars.

Murder—A. B. murdered C. D.

Manslaughter—A. B. killed C. D.

Perjury—A. B. appeared as a witness in a case between C. D. and E. F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony).

Rape—A. B. raped or ravished C. D.

Rape (statutory)—A. B. raped or ravished C. D., she C. D. being then under the age of (statutory age) years.

Robbery Armed—A. B. robbed C. D., A. B. being armed.

Robbery—A. B. robbed C. D., A. B. not being armed.

Proviso.

Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

What indictment, etc., to contain.

SEC. 45. The indictment or information shall contain:

1. The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged;

2. The time of the offense as near as may be but no variance as to time shall be fatal unless time is of the essence of the offense.

3. That the offense was committed in the county or within the jurisdiction of the court. But no verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was so committed unless the accused have raised such question before the case is submitted to the jury.

Defect amended.

SEC. 46. Any defect, error or omission in the caption, commencement or conclusion of an indictment may be amended.

Repugnant allegations.

SEC. 47. No indictment is invalid by reason of any repugnant allegations contained therein, provided that an offense is charged. All unnecessary allegations shall be rejected as surplusage.

When not deemed objectionable.

SEC. 48. No indictment for any offense created or defined by statute shall be deemed objectionable for the reason that it fails to negative any exception, excuse or proviso contained in the statute creating or defining the offense. The fact that the charge is made shall be considered as an allegation that

no legal excuse for the doing of the act exists in the particular case.

Identification of accused.

SEC. 49. In any indictment it is sufficient for the purpose of identifying the accused to state his true name, to state the name, appellation or nickname by which he has been or is known, to state a fictitious name, or to describe him as a person whose name is unknown or to describe him in any other manner. In stating the true name or the name by which the accused has been or is known or a fictitious name, it is sufficient to state a surname, a surname and one or more christian name or names, or a surname and one or more abbreviations or initials of a christian name or names. It is sufficient for the purpose of identifying any group or association of persons, not incorporated, to state the proper name of such group or association (if such there be), to state any name or designation by which the group or association has been or is known, to state the names of all the persons in such group or association or of one or more of them, or to state the name or names of one or more persons in such group or association referring to the other or others as "another" or "others". It is sufficient for the purpose of identifying a corporation to state the corporate name of such corporation, or any name or designation by which such corporation has been or is known. It is not necessary for the purpose of identifying any group or association of persons or any corporation to state or prove the legal form of such group or association of persons or of such corporation. In no case is it necessary to aver or prove that the true name of any person, group or association of persons or corporation is unknown to the grand jury, complainant or prosecuting officer. If in the course of the trial the true name of any person, group or association of persons or corporation identified otherwise than by the true name, is disclosed by the evidence, the court shall on motion of the accused or of the prosecuting attorney, and may without such motion, insert the true name in the indictment wherever the name appears otherwise.

Corporations.

Instruments, how described.

SEC. 50. Whenever in an indictment an allegation relative to any instrument which consists wholly or in part of writing or figures, pictures or designs, is necessary, it is sufficient to describe such instrument by any name or description by which it is usually known or by its purport without setting forth a copy or facsimile of the whole or any part thereof.

Allegation of time sufficient.

SEC. 51. Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: *Provided,* That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

Proviso.

What may not contain.

SEC. 52. The indictment need contain no allegation of the means by which the offense was committed except insofar as the means is an element of the offense.

Need not allege value, etc.

SEC. 53. The indictment need not allege the value or price of any property unless the value or price is an element of the offense and in such case it is sufficient to aver that the value or price of the property is less than, equals or exceeds the certain value or price which determines the offense or grade thereof.

Ownership, need not allege.

SEC. 54. The indictment need not allege the ownership of any property unless such ownership is necessary to indicate the offense. Proof of possession or right of possession or lien or special property in the person alleged to be the owner shall be sufficient to sustain an allegation of ownership in such person.

Offense constituted of several acts.

SEC. 55. In an indictment for an offense which is constituted of one or more of several acts, or which may be committed by one or more of several means, or with one or more of several intents, or which may produce one or more of several results, two or more of such acts, means, intents or results may be charged in the alternative.

Prior conviction.

SEC. 56. Whenever it is necessary to allege a prior conviction of the accused in an indictment, it is sufficient to allege that the accused was at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, if it have one, or stating the substantial elements thereof.

Reference to statute.

SEC. 57. In pleading a statute or a right derived therefrom it is sufficient to refer to the statute by its title, or in any other manner which identifies the statute and the court must thereupon take judicial notice thereof.

Judgment, etc.

SEC. 58. In pleading a judgment or other determination of, or a proceeding before any court or officer, civil or military, it is unnecessary to allege the facts conferring jurisdiction on such court or officer, but it is sufficient to allege generally that such judgment or determination was duly given or made or such proceedings had.

What need not allege.

SEC. 59. The indictment need not allege that the offense was committed or the act done "feloniously" or "traitorously" or "unlawfully" or "with force of arms" or "with a strong hand," nor need it use any phrase of like kind otherwise than to characterize the offense, nor need it allege that the offense was committed or the act done "burglariously", "wilfully", "knowingly", "maliciously", "negligently" nor need it otherwise characterize the manner of the commission of the offense unless such description is necessary to indicate the offense. The indictment need not contain the words "contrary to the statute", "as appears by the record", or any other words of similar import.

Embezzlement, etc.

SEC. 60. In any prosecution for the offenses of embezzlement, larceny, larceny by conversion, or obtaining money or property by false pretenses under the statutes of this state,

it shall be sufficient to allege generally in the information or indictment the embezzlement, larceny, larceny by conversion or obtaining by false pretenses of personal property to a certain amount without specifying the particulars of such embezzlement, larceny, larceny by conversion or obtaining by false pretenses, and on the trial evidence may be given of any such embezzlement, larceny, larceny by conversion or obtaining money or property by false pretenses within six months next after the time stated in the information or indictment, and it shall be sufficient to maintain the charge in the information or indictment and shall not be deemed at variance if it shall be proved that any personal property was fraudulently embezzled, stolen or obtained by false pretenses within the said period of six months.

Larceny, etc.

SEC. 61. In an indictment for larceny, larceny by conversion, embezzlement, robbery, obtaining money by false pretenses, receiving stolen property or for any other criminal conversion or misappropriation where the offense relates to money or currency, it shall be sufficient to describe the same under the terms "money", "currency", or "dollars" without specifying the particular character, number, denomination, kind, species, nature or value thereof. Where such indictment relates to promissory notes, certificates of stock, bonds, bills of lading, mortgages or any other negotiable or non-negotiable instruments, or securities or evidence of debt or property, it is sufficient to designate the same by general description without specifying the particular number or denomination thereof.

Where may be indicted.

SEC. 62. In the cases where any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding such theft was committed in another county.

When stolen property removed to another county.

SEC. 63. When any property shall be stolen in one county and brought into another, the offender may be indicted, tried and convicted in the county into which such stolen property was brought, in the same manner as if such property had been originally stolen in that county; and when such property shall have been taken by burglary or robbery the offender may be indicted, tried and convicted of said burglary or robbery, in the county into which such property was brought in the same manner as if such burglary or robbery had been committed in that county.

Property stolen in another state.

SEC. 64. Every person who shall feloniously steal the property of another, in any other state or country, and shall bring the same into this state, may be indicted, convicted and punished in the same manner as if such larceny had been committed in this state; and in every such case such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought: *Provided,* That every such person may plead a

Proviso.

former conviction or acquittal for the same offense in another state or country; and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offense.

Receiver of stolen property, where indicted.

SEC. 65. Every receiver of personal property that shall have been feloniously stolen, knowing the same to have been stolen, may be indicted, convicted and punished in any county where he received or had such property in the same manner that receivers of personal property stolen in this state are indicted, convicted and punished, notwithstanding such theft was committed in any other state or country.

Abettors, etc.

SEC. 66. Every person who shall aid and abet any thief, such thief having brought the stolen property into this state, may be indicted, convicted and punished in the same manner, notwithstanding such theft was committed in any other state or country, that aiders and abettors are punished, where the theft was originally committed within this state.

Accessories charged with substantive felonies.

SEC. 67. Any number of accessories after the fact, or receivers, buyers, or persons aiding in the concealment of any stolen money, goods, or property may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

Two or more jointly receiving property stolen.

SEC. 68. If two or more persons are indicted for jointly receiving, buying or aiding in the concealment of any stolen property, and the evidence shall be that one or more persons separately, knowingly received, bought or aided in the concealment of any part of such property, the jury may convict upon such indictment those who are proved to have received, bought or aided in the concealment of any part of such property.

Indictment for larceny.

SEC. 69. An indictment for larceny may contain also a count for embezzlement, larceny by conversion or for receiving or having in possession, or aiding in concealing the same property, knowing it to have been stolen, and the jury may convict of any such offense; and the jury may find all or any of the persons indicted, guilty of any of the offenses charged in the indictment. The prosecuting attorney shall not be required to elect between the offenses so charged.

Libel.

SEC. 70. An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libelled of the defamatory matter on which the indictment is founded, but it is sufficient to state generally that the same was published concerning him.

Murder, etc.

SEC. 71. In all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased; and it shall be sufficient in manslaughter to charge that the defendant did kill the deceased.

Manslaughter.

SEC. 72. An indictment or information for manslaughter may contain also a count for procuring or attempting to procure an abortion and the jury may convict of either offense. Dying declarations shall be admissible in evidence in proof of either count.

Perjury, etc.

SEC. 73. An indictment for perjury or for subornation of, solicitation, or conspiracy to commit perjury, is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before what court or officer the oath was taken or was to have been taken, without setting forth any part of the records or proceedings with which the oath was connected, and without stating the commission or authority of the court or other authority before whom the perjury was committed or was to have been committed or the form of the oath or affirmation or the manner of administering the same.

Motion to quash, etc.

SEC. 74. No motion to quash, plea in abatement or other dilatory plea to the indictment, shall be received by any court unless the party offering such plea shall prove the truth thereof by affidavit, or by some other sworn evidence.

When not quashed, etc.

SEC. 75. No indictment shall be quashed, set aside or dismissed for any one or more of the following defects: (First) That there is a misjoinder of the parties accused; (Second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein; (Third) That any uncertainty exists therein. If the court be of the opinion that the first and second defects or either of them exist in any indictment, it may sever such indictment into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect.

Idem.

SEC. 76. No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights

May amend indictment.

will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

In case jury discharged.

When issue joined.

SEC. 77. When an issue of fact shall be joined upon any indictment, the court in which the same is pending may, on application of the defendant, grant a commission to examine any material witnesses residing out of this state, in the same manner as in civil cases.

Interrogatories, settlement of.

SEC. 78. Interrogatories to be annexed to such commission shall be settled and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the deposition taken thereon and returned shall be read in the same cases, and with like effect in all respects, as in civil suits.

When witnesses examined in behalf of defendant.

SEC. 79. After an indictment shall be found against any defendant, he may have witnesses examined in his behalf conditionally on the order of a judge of the court in which the indictment is pending, in the same cases upon the like notice to the prosecuting attorney, and with like effect in all respects as in civil suits.

CHAPTER VIII.

Trials.

Trial without delay.

SECTION 1. The people of this state and persons charged with crime are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial.

Criminal cases take precedence.

SEC. 2. The trial of criminal cases shall take precedence over all other cases; but this provision shall not be interpreted to mean that trials of civil cases shall not be interspersed between trials of criminal cases triable before a jury at any term of court. No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record: *Provided*, That no court shall adjourn, continue or delay the trial of any criminal cause by the consent of the

Adjournments, etc.

Proviso.

prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done.

Felony, etc.

SEC. 3. No person indicted for a felony shall be tried unless personally present during the trial; persons indicted or complained against for misdemeanors may, at their own request, through an attorney, duly authorized for that purpose, by leave of the court, be put on trial in their absence.

When not acquitted.

SEC. 4. If, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not by reason thereof, be entitled to an acquittal of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which the trial shall be had, shall discharge the jury from giving any verdict upon such trial, and shall direct such person to be indicted for felony.

Joint defendants, how tried.

SEC. 5. When two or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court.

Crime committed while confined in prison.

SEC. 6. Any person now or hereafter confined in any penal or reformatory institution in this state, and who during the term of such confinement shall commit any crime or offense punishable under the laws of this state by imprisonment in such institution, shall be subject to the same punishment as if the crime had been committed at any other place or by a person not so confined.

Jurisdiction, who to have.

SEC. 7. The circuit court of the county in which the prison or institution named in the preceding section is, shall have jurisdiction over cases arising under the foregoing section, and the proceedings thereto pertaining shall in all ways conform to the law and rules in cases of like offenses occurring elsewhere, except that the examination may be held in one of the offices of the penal institutions where the crime is committed, at the option of the magistrate before whom the complaint may be made, and that the warrant shall be made in the ordinary form, shall be directed to the warden or keeper of such institution, and shall set forth that the accused is imprisoned in such institution under and by authority of the laws of the state of Michigan; and further, that the person so confined shall remain in the custody of such warden or keeper subject to the order of the circuit court of the county in which such institution is located. All jurors' fees, witness fees and fees of attorneys appointed by the court under the statute, for the defendant, shall be approved by the circuit judge and audited and allowed by the board of state auditors and paid by the state treasurer upon the warrant of the auditor general. The provisions of this and the preceding section shall apply to persons who are temporarily outside the limits of the institutions named in such sections, except

Fees, approval of.

those prisoners who have received a parole by due process of law and are at liberty under the terms of such parole.

Issues of fact, trial of.

SEC. 8. Issues of fact joined upon any indictment shall be tried by a jury drawn, returned, examined on voir dire and empaneled in the manner provided by law for the trial of issues of fact in civil cases: *Provided,* That nothing in this act shall change any of the provisions of statutes now in force providing special methods of drawing, returning, empaneling and examining jurors in courts where such provision is made by any general, special or local act: *Provided further,* That the accused may waive any trial by jury in the manner set forth by the provisions of this act.

Proviso.

Further proviso.

When grand juror not put on trial jury.

SEC. 9. No member of the grand jury which has found an indictment shall be put upon the jury for the trial of such indictment, if challenged for that cause by the defendant.

Insufficient ground of challenge.

SEC. 10. The previous formation or expression of opinion or impression, not positive in its character, in reference to the circumstances upon which any criminal prosecution is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, such opinion or impression not being positive in its character, or not being based on personal knowledge of the facts in the case, shall not be a sufficient ground of challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror upon the trial of such action: *Provided,* That the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath, that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial: *Provided further,* That the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.

Proviso.

Further proviso.

Who not allowed to serve.

SEC. 11. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.

Peremptory challenges.

SEC. 12. Any person who is put on trial for an offense which is not punishable by death or life imprisonment shall be allowed to challenge peremptorily five of the persons drawn to serve as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily in such cases five of such jurors and no more. In cases involving two or more defendants who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily five persons returned as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times five of the persons returned as jurors as there may be defendants being so jointly tried.

Capital offenses.

SEC. 13. Any person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed

to challenge peremptorily twenty of the persons drawn to serve as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily fifteen of such persons, and no more. In cases involving two or more defendants, who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily twenty persons returned as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times fifteen of the persons returned as jurors as there may be defendants being so jointly tried.

Oath of jurors.

SEC. 14. The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God."

Substitution.

SEC. 15. Any juror shall be allowed to make affirmation, substituting the words "This you do under the pains and penalties of perjury" instead of the words "so help you God."

Separation of jurors.

SEC. 16. The jurors sworn to try a criminal action in any court of record in this state, may, at any time before the cause is submitted to the jury, in the discretion of the court, be permitted to separate or to be kept in charge of proper officers. When an order shall have been entered by the court in which such action is being tried, directing said jurors to be kept in charge of such officers, the following oath shall be administered by the clerk of the court to said officers: "You do solemnly swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial from separating from each other; that you will not suffer any communication to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God." And thereafter it shall be the duty of the officer so sworn to keep the jury from separating, or from receiving any communication of any character, until they shall have rendered their verdict, except under a special instruction in writing from the trial judge. After the jurors retire to consider their verdict, the court may permit the jurors to separate temporarily, whenever in his judgment such a separation is deemed proper: *Provided,* That in cases where separation of the members of a jury is now forbidden by law, the authority hereby granted shall not extend to permitting separation of the members of the jury of the same sex.

Proviso.

Medical attendance of juror.

SEC. 17. The trial judge may order, in case of illness of any jurors mentioned in the preceding section, that such juror may receive medical attendance, and may be removed

to his home or some other place agreeable to the judge during the continuance of his illness; and that any of the jurors may receive such newspapers and letters as make no mention of the trial then in progress, or of any facts connected therewith, which shall first be inspected by the said judge.

When jury of 14 impaneled.

SEC. 18. Any judge of a court of record in this state about to try a criminal case which is likely to be protracted, may order a jury empaneled of not to exceed fourteen members, who shall have the same qualifications and shall be empaneled in the same manner as is, or may be, provided by law for empaneling juries in such courts. All of said jurors shall sit and hear said cause. Should any condition arise during the trial of said cause which in the opinion of the trial court justifies the excusal of any of the jurors so empaneled from further service, he may do so and said trial shall proceed, unless the number of said jurors be reduced to less than twelve, and in the event that there shall be more than twelve jurors left on said jury after the charge of the court, the clerk of the court in the presence of said court shall place the names of all of the said jurors on slips, folded so as to conceal the names thereon, in a suitable box provided for that purpose, and shall draw therefrom the names of a sufficient number to reduce the jury to twelve members who shall then proceed to determine the issue presented in the manner provided by law.

Perjury, who deemed guilty of.

SEC. 19. Any officer having taken an oath required by any provision of this chapter who shall knowingly and wilfully violate the same or permit the same to be violated, shall, on conviction thereof, be adjudged guilty of the crime of perjury and subject to all the pains and penalties thereof.

Notice of intention to claim alibi.

SEC. 20. Whenever a defendant in a criminal case not cognizable by a justice of the peace shall propose to offer in his defense testimony to establish an alibi on behalf of the defendant, or of the insanity of such defendant either at the time of the alleged offense or at the time of trial, such defendant shall not less than four days before the trial of such cause file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to claim such defense and in cases of a claimed alibi such notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

Filing of.

Failure to file.

SEC. 21. In the event of the failure of a defendant to file the written notice prescribed in the preceding section, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing an alibi or the insanity of such defendant as set forth in the preceding section.

Rules of evidence governing.

SEC. 22. The rules of evidence in civil actions, in so far as the same are applicable, shall govern in all criminal and quasi criminal proceedings except as otherwise provided by law.

Exceptions.

SEC. 23. It shall not be necessary in the trial of any criminal cause to except to any ruling or action of the court, if

an objection thereto was fully made but an exception shall be deemed to follow as a matter of course.

When questions not objectionable.

SEC. 24. Within the discretion of the court no question asked of a witness shall be deemed objectionable solely because it is leading.

Signatures, proof of.

SEC. 25. Whenever in the trial of any criminal case it shall be necessary or proper to prove the signature of any person, it shall be competent to introduce in evidence for the purpose of comparison, any specimen or specimens of the handwriting or signature of such person, admitted or proved to the satisfaction of the court to be genuine, whether or not the paper on which such handwriting or signature appears is one in evidence or connected with the case or not.

Testimony taken by deposition, etc.

SEC. 26. Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

What acts may be proved.

SEC. 27. In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

View by jury.

SEC. 28. The court may order a view by any jury empaneled to try a criminal case, whenever such court shall deem such view necessary.

Duty of judge.

SEC. 29. It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.

Exceptions to charge not necessary.

SEC. 30. It shall not be necessary in any criminal suit, action or proceeding in any court of record, to except to the charge given to the jury, or to the refusal to give any charge requested by either of the parties to such suit, action or proceeding, but any party aggrieved by any such charge or refusal to charge, may assign error upon such charge or refusal to

charge in his assignments of error, the same as if exception had been made to such charge or refusal to charge.

When defendant discharged.

SEC. 31. Whenever two or more persons shall be included in the same indictment and it shall appear that there is not sufficient evidence to put any defendant on his defense, it shall be the duty of the court to order such defendant to be discharged from such indictment, before the evidence shall be deemed to be closed.

Degree of offense.

SEC. 32. Upon an indictment for any offense, consisting of different degrees, as prescribed in this chapter, the jury may find the accused not guilty of the offense in the degree charged in the indictment and may find such accused person guilty of any degree of such offense, inferior to that charged in the indictment, or of an attempt to commit such offense.

When conviction for different degree prohibited.

SEC. 33. When a defendant shall be acquitted or convicted upon any indictment for an offense, consisting of different degrees, he shall not thereafter be tried or convicted for a different degree of the same offense; nor shall he be tried or convicted for any attempt to commit the offense charged in the indictment or to commit any degree of such offense.

When not liable for costs, etc.

SEC. 34. No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office or for any charge for subsistence while he was in custody.

Plea of guilty.

SEC. 35. Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed.

CHAPTER IX.

Judgment and Sentence.

Who may pass sentence.

SECTION 1. The justices of the supreme court, or any of them, or any of the several circuit judges in the respective circuits, or any judge of a court of record having jurisdiction of criminal cases, in this state, are hereby authorized and empowered to pronounce judgment against and pass sentence upon all persons heretofore convicted, or that may hereafter be convicted in any court held by said justices, or judges, or any of them, for any offense heretofore committed or that may hereafter be committed against the laws of this state: *Provided,* That such sentence shall in no case or respect be greater

Proviso.

than the penalty now or that may be prescribed hereafter by law.

Court may order person kept in solitary confinement, etc.

SEC. 2. Whenever any person shall be lawfully sentenced by any court to imprisonment in the state prison or in any county jail, it shall be competent for the court awarding the sentence, to incorporate therein a provision that the person so sentenced shall be kept in solitary confinement or at hard labor, or both, during the term of such imprisonment, or any specific portion thereof.

Conditional sentences.

SEC. 3. When any person shall be convicted of an offense punishable at the discretion of the court, either by fine or imprisonment in the county jail or by a fine or imprisonment in the state prison, the court may award against such offender a conditional sentence and order him to pay a fine, with or without the costs of prosecution, within a limited time to be expressed in the sentence, and, in default thereof, to suffer such imprisonment as is provided by law and awarded by the court. The court may also place such offender on probation with the condition that he pay a fine or costs or damages or any or all of them, as the case may be, in installments with any limited time and may, in case of the default in any of such payments, impose such sentence as is provided by law.

Probation.

To whom committed.

SEC. 4. The person against whom any such conditional sentence shall be awarded, shall be forthwith committed to the custody of an officer in court or to the county jail, to be detained until the sentence be complied with; and if he shall not pay the fine within the time limited, the sheriff shall cause the other part of the sentence to be executed forthwith.

When punished by fine and imprisonment.

SEC. 5. Whenever it is provided that an offender shall be punished by imprisonment and a fine, such offender may at the discretion of the court, be sentenced to be punished by such imprisonment without the fine or by such fine without the imprisonment; and whenever it is provided that an offense shall be punished by fine or imprisonment, the court may impose both such fine and imprisonment in its discretion. If the court shall impose both a fine, costs and imprisonment in any state prison or reformatory the offender shall be detained in said prison or reformatory until said fine and costs are paid, not exceeding however, the additional time expressed in said sentence for the non-payment of the same.

May require recognizance.

SEC. 6. Every court before whom any person shall be convicted upon an indictment for any offense not punishable with death or by imprisonment in the state prison may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties in a reasonable sum, to keep the peace or to be of good behavior, or both, for any time not exceeding two years and to stand committed until he shall so recognize.

Breach of condition of.

SEC. 7. In case of a breach of the condition of any such recognizance the same proceedings shall be had as are pre-

scribed in relation to recognizances to keep the peace in other cases.

To fix minimum term.

SEC. 8. When any person shall hereafter be convicted for the first time of crime committed after this act takes effect, the punishment for which prescribed by law may be imprisonment in the state prison at Jackson, the Michigan reformatory at Ionia, the state house of correction and branch of the state prison in the upper peninsula, the Detroit house of correction, or any other prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term except as hereinafter provided. The maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence. He shall before or at the time of passing such sentence ascertain by examination of such convict on oath, or otherwise, and by such other evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of such convict, which facts and such other facts as shall appear to be pertinent in the case, he shall cause to be entered upon the minutes of the court.

Where not applicable.

SEC. 9. The provisions of this chapter, relative to indeterminate sentences, shall not apply to any person convicted of an offense, the only punishment for which prescribed by law is imprisonment for life: *Provided,* That in all cases where the maximum sentence in the discretion of the court may be for life or any number of years, the court imposing the sentence shall fix both the minimum and maximum sentence.

Proviso.

Punishment for felony.

SEC. 10. A person, who after having been convicted within this state of a felony, or an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which if committed within this state would be a felony, commits any felony within this state, is punishable upon conviction, as follows: If the subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than one-half of the longest term nor more than one and one-half times the longest term prescribed for a first conviction of such offense.

Person twice convicted of felony.

SEC. 11. A person who after having been twice convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other states, governments or countries, of a crime which if committed within this state would be a felony, commits any felony within this state, is punishable upon conviction as follows: If the felony for which such offender is tried is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term nor more than twice the longest term prescribed by law for a first conviction of such offense.

Penalty.

Person three times convicted.

SEC. 12. A person who after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonious, commits a felony within this state, must be sentenced upon conviction of such fourth or subsequent offense, to imprisonment in a state prison for the term of his natural life. Offenders sentenced under this and the last two preceding sections shall not be eligible to parole before the expiration of the minimum term fixed by the sentencing judge at the time of sentence without the written approval of the judge of such court or any judge of such court if the sentencing judge is not then serving. A person to be punishable under this and the last two preceding sections need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section.

Penalty.

Information accusing of previous convictions.

SEC. 13. If at any time after conviction and either before or after sentence it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth in any of the three foregoing sections, it shall be the duty of the prosecuting attorney of the county in which such conviction was had to file an information in such cause accusing the said person of such previous convictions. Whereupon the court in which such conviction was had shall cause the said person whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information, and of his right to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person, or remains silent, the court shall enter a plea of not guilty, and a jury of twelve jurors shall be empaneled from the petit jurors serving at the then or a following term of said court to determine the issues raised by such information and plea. The accused may waive trial by jury in the manner provided by this act. The usual practice in the trial of criminal cases shall be followed in the empanelling of such jury and the trial of said issue and the prosecuting officer and the accused shall each be allowed five peremptory challenges. If the accused shall plead guilty to such information or if the jury shall return a verdict of guilty, the court shall sentence him to the punishment prescribed in the three preceding sections, as the case may be, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated if required. Whenever it shall become known to any warden, or prison, probation, parole, or other peace officer that any person charged with or convicted of a felony has been previously convicted within the meaning of the three preceding sections, it shall become his duty forthwith to report the facts to the prosecuting attorney of the county in which such person is charged or was sentenced.

When plea of not guilty entered by court.

Duty of warden, etc.

Unsuccessful attempt to commit offense.

SEC. 14. Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

Penalties.

1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be punished by imprisonment in the state prison not more than ten years;

2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the state prison not more than five years or in the county jail not more than one year;

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than five years, or by imprisonment in the county jail or by fine, the offender convicted of such attempt shall be punished by imprisonment in any state prison or reformatory not more than two years or in any county jail not more than one year or by a fine not to exceed one thousand dollars; but in no case shall the imprisonment exceed one-half of the greatest punishment which might have been inflicted if the offense so attempted had been committed.

When no provision for punishment made.

SEC. 15. Every person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be punished by imprisonment in any state prison or reformatory not more than five years, or in the county jail not more than one year, or by fine not exceeding two thousand dollars, or both, in the discretion of the court.

When sheriff to execute sentence.

SEC. 16. When any person convicted of an offense shall be sentenced to pay a fine or costs, or to be imprisoned in the county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county or some officer in court, a transcript from the minutes of the court, of the conviction and sentence duly certified by such clerk, which shall be sufficient authority for the sheriff to execute such sentence, and he shall execute the same accordingly.

When convict sentenced to imprisonment.

SEC. 17. When any convict shall be sentenced to imprisonment in the state prison, the clerk of the court before whom such conviction was had, shall make out a warrant, under the seal of the court, directed to the sheriff of the county, requiring him to cause such convict, without needless delay, to be removed from the county jail to the state prison, which warrant shall be delivered to such sheriff and be obeyed by him and shall be accompanied by a certified abstract from the minutes of the court, of such conviction and sentence as aforesaid.

Duty of clerk when person convicted of crime.

SEC. 18. Whenever a person shall be convicted of crime and sentenced to imprisonment pursuant to the provisions of this chapter, the clerk of the court shall make and forward to the warden or superintendent of the institution to which the convict is sentenced, and also to the governor, a record containing a copy of the information or complaint, the sentence pronounced by the court, the name and residence of the judge presiding at the trial, prosecuting attorney and sheriff, and the names and postoffice addresses of the jurors and the witnesses sworn on the trial, together with a statement of any fact or facts which the presiding judge may deem important or necessary for a full comprehension of the case, and a reference to the statute under which the sentence was imposed. One copy of the said record shall be delivered to the warden or superintendent at the time the prisoner is received into the institution, and one copy shall be forwarded to the governor within ten days thereafter. In each case in which he shall perform the duties required by this act, the clerk of the court shall be entitled to such compensation as shall be certified to be just by the presiding judge at the trial, not to exceed three dollars for any one case, which shall be paid by the county in which the trial is had as a part of the expense of such trial.

Conviction of crime punishable with death.

SEC. 19. When any person shall be convicted of any crime punishable with death and sentenced to suffer such punishment, he shall at the same time be sentenced to hard labor in the state prison until such punishment of death shall be inflicted.

When death sentenced executed.

SEC. 20. And no person, so sentenced and imprisoned shall be executed in pursuance of such sentence within one year from the day such sentence of death was passed, nor until the whole record of the proceedings shall be certified by the clerk of the court in which the conviction was had, under the seal thereof to the governror of this state nor until a warrant shall be issued by the governor, under the great seal of the state, directed to the sheriff of the county in which the state prison may be situated, commanding the said sentence of death to be carried into execution.

How inflicted.

SEC. 21. The punishment of death shall, in every case, be inflicted by hanging the convict by the neck until he is dead; and the sentence shall at the time directed by the warrant, be executed within the walls of the state prison, or within the enclosed yard thereof.

Who present at.

SEC. 22. The sheriff of the county shall be present at the place of execution, unless prevented by sickness or other casualty, and also two of his deputies, designated by him; and he shall request the presence of the prosecuting attorney, and twelve respectable citizens, including a surgeon or physician, and shall permit the counsel of the prisoner and such ministers of the gospel as the criminal shall desire, and his relations, to be present, also such officers of the prison,

deputies, constables, and military guard, as he may see fit, but no others.

Return made by sheriff.

SEC. 23. Whenever a sheriff shall inflict the punishment of death upon any convict in obedience to a warrant from the governor, he shall make return thereof under his hand, with his doings thereon, to the office of the secretary of state, as soon as may be; and shall also transmit to the clerk of the court in which the conviction was had, an attested copy of the warrant and return thereon; and the clerk shall place the same on file, with the indictment, and subjoin to the record of the sentence, a brief abstract of the sheriff's return on the warrant.

When penalty in excess of law.

SEC. 24. Whenever, in any criminal case, the defendant shall be adjudged guilty and a punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be judged altogether void, nor be wholly reversed and annulled by any court of review, but the same shall be valid and effectual to the extent of the lawful penalty, and shall only be reversed or annulled on writ of error or otherwise, in respect to the unlawful excess.

Where imprisoned.

SEC. 25. Any court of criminal jurisdiction in this state shall have power in the discretion of the court, to sentence any male person convicted for the first time of any offense, rape, murder and treason excepted, punishable by imprisonment in the state prison, to imprisonment in the Michigan reformatory at Ionia or the Detroit house of correction, instead of the state prison, and every such person so sentenced shall be received into the said reformatory or house of correction, and shall be kept and employed therein in the manner prescribed by law, and shall be subject to the rules and discipline of the said reformatory or house of correction:

Proviso.

Provided, That on the discharge of prisoners at the expiration of their terms of imprisonment in said Detroit house of correction they shall be returned to their homes in the state, if known, at the expense of the Detroit house of correction.

When judgment not set aside, etc.

SEC. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

CHAPTER X.

New Trials, Writs of Error and Bills of Exceptions.

New trial, when granted.

SECTION 1. The court in which the trial of any indictment shall be had may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when

it shall appear to the court that justice has not been done, and on such terms or conditions as the court shall direct.

Motions for, when made.

SEC. 2. Motions for new trials shall be made within thirty days after verdict, and not afterwards.

Writs of error.

SEC. 3. Writs of error in criminal cases shall issue only in the discretion of the supreme court or any justice thereof, on proper application therefor.

Notice given to prosecuting attorney.

SEC. 4. Any person desiring to secure a writ of error under the provisions of this act shall, within twenty days after judgment, or within ten days after denial of a motion for new trial, prepare a concise statement of what is involved in the case and the errors relied upon, and shall notice the same upon the prosecuting attorney for settlement before the trial judge, so that such statement may be amended, settled and signed by the trial judge within thirty days after judgment or denial of motion for a new trial.

Extension of time for noticing, etc.

SEC. 5. The time for noticing and securing the settlement of such statement may, upon good cause shown, be extended by the trial court, upon proper application therefor and notice to the prosecuting attorney. The order granting such extension shall be returned to the supreme court together with the application for the writ of error.

Statement presented to supreme court.

SEC. 6. Such statement when settled and signed shall be presented to the supreme court or any justice thereof within ten days after the same is so settled and signed, and shall be the basis of the application to the supreme court for a writ of error.

Notice of decision of court.

SEC. 7. Notice of the decision of the supreme court on such application for a writ of error shall forthwith be transmitted by the clerk of the supreme court to the prosecuting attorney and to the attorney for the defendant.

Defendant admitted to bail.

SEC. 8. During the time between judgment and the decision of the supreme court or any justice thereof on the application for a writ of error under this act, the trial judge may, in his discretion, admit the defendant to bail, if the offense charged is bailable.

Appellant admitted to bail.

SEC. 9. Upon granting application for a writ of error the appellant may, in the discretion of the supreme court or any justice thereof, be admitted to bail, if the offense charged be bailable.

Bills of exceptions.

SEC. 10. Bills of exceptions in criminal cases shall be settled only within the time and in the manner hereinafter provided.

When writ granted.

SEC. 11. If the application for such writ of error is granted, the appellant shall have not less than twenty days thereafter in which to settle a bill of exceptions. Further time for settlement of a bill of exceptions may be granted by the trial judge in the same manner as is now provided in civil cases; such time, however, shall not exceed in all three months from the date of the order granting application for a writ of error by the supreme court: *Provided,* Upon proper application before expiration of the time and for good cause shown,

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the supreme court or any justice thereof may extend such time not to exceed one year from the date of judgment.

Writ of error, when taken.

SEC. 12. A writ of error may be taken by and on behalf of the people of the state of Michigan in accordance with the provisions of this act in the following instances:

(a) From a decision or judgment quashing or setting aside any indictment where such decision or judgment is based upon the invalidity or construction of the statute upon which such indictment is founded;

(b) From a decision arresting a judgment of conviction or directing a judgment of acquittal for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which such indictment is founded.

The right of the defendant to bail upon issuance of a writ of error under the provisions of this section shall be governed by the provisions of chapter five of this act.

How issued.

SEC. 13. Writs of error granted by the supreme court under the provisions of this act shall be issued after the settlement of the bill of exceptions, and in the same manner as is now provided in civil cases.

Court to adopt rules of practice.

SEC. 14. As soon as practicable after the passage of this act the supreme court shall adopt such rules of practice as may be necessary to carry out the provisions of said act.

Acts repealed.

SEC. 15. All acts and parts of acts relative to exceptions before sentence in criminal cases, and all other provisions of law inconsistent with the provisions of this chapter, are hereby expressly repealed.

CHAPTER XI.

Probation.

When defendant placed on probation.

SECTION 1. In all prosecutions for crimes or misdemeanors, except murder, treason, robbery while armed, and breaking and entering an occupied dwelling house in the night time, where the defendant has been found guilty upon verdict or plea, and where the court has power to sentence such defendant to fine or imprisonment, and where it appears to the satisfaction of the court that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty imposed by law, said court shall have the power to place the defendant on probation under the charge and supervision of a probation officer: *Provided,* That no person who has been twice convicted of a felony in this state or elsewhere, shall be so placed on probation.

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Period of.

SEC. 2. If respondent is convicted of an offense not a felony the period of probation shall not exceed two years, and if he is convicted of a felony, it shall not exceed five years. The court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case fix

and determine the period and conditions of probation and such order, whether it is filed or entered, shall be considered as part of the record in the cause and shall be at all times alterable and amendable, both in form and in substance, in the court's discretion.

Conditions.

SEC. 3. The conditions of probation shall include the following:

(1) That the probationer shall not, during the term of his probation, violate any criminal law of the state of Michigan, or any ordinance of any municipality in said state;

(2) That he shall not, during the term of his probation, leave the state without the consent of the court granting his application for probation;

(3) That he shall make a report to the probation officer, either in person or in writing, monthly, or as often as the latter may require.

Other conditions.

The court may impose such other lawful conditions of probation as the circumstances of the case may require or warrant, or as in its judgment may be meet and proper; and in case it requires the probationer to pay any costs it shall not be confined to or governed by the laws or rules governing the taxation of costs in ordinary criminal procedure, but may summarily tax and determine such costs without regard to the items ordinarily included in taxing costs in criminal cases and may include therein all such expenses, direct and indirect, as the public has been or may be put to in connection with the apprehension, examination, trial and probationary oversight of the probationer.

Orders revocable.

SEC. 4. All probation orders shall be revocable and terminable after summary hearing for any violation by the probationer of any of the conditions of his probation; and the court may in its probation orders or by general rule, or both, provide for the apprehension, detention and confinement of any probationer accused of violating the terms of his probation, for the presentation of charges of such violation and the hearing therein, including amendments of charges, continuances and adjournments of hearings, and all matters in connection therewith; but in case the court shall fail to so provide, or in any case by consent of the court, proceedings for such termination and revocation may be instituted by petition and order to show cause, and the court on presentation of such petition and hearing on such order may make all such orders respecting the apprehension, detention, confinement and disposition of the probationer and all other matters in relation thereto, as in its judgment the welfare and protection of the public and probationer may require. In case such probation order is terminated and revoked, the court may proceed to sentence such probationer in the same manner and to the same penalty as it might have done if such probation order had never been made.

Proceedings instituted.

Report of termination.

SEC. 5. Upon the termination of the probation period, the probation officer shall report the fact to the court and also

the conduct of the probationer during the period of probation, and the court may thereupon discharge the probationer from further supervision and enter a judgment of suspended sentence, or extend the probation period, as the circumstances may require: *Provided,* That the maximum period or probation herein limited shall not be exceeded.

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Entry of discharge.

SEC. 6. When a probationer is discharged upon the expiration of the probation period, or upon its earlier termination by order of the court, entry of the discharge shall be made in the records of the court, and the probationer shall be entitled to a certified copy thereof.

Chief probation officer, who to recommend.

SEC. 7. The circuit court of each of the several judicial circuits throughout the state of Michigan may recommend a chief probation officer, may also recommend assistant probation officers who shall be appointed by the governor, each of whom shall act as such probation officer in the judicial circuit in which he shall have been appointed, and who shall receive such compensation as the boards of supervisors of the several counties shall provide. In cities having a municipal court, superior court, recorder's court or police court, the judge or judges of said courts may recommend a chief probation officer and may also recommend assistant probation officers, each of whom shall be appointed by the governor, and shall act as such probation officer within the limits of the territorial jurisdiction of such courts, and who shall receive such compensation as the board of supervisors of the several counties or the common councils of the several cities may provide: *Provided,* That the number of probation officers appointed for any city or county shall not exceed one for every fifty thousand inhabitants or less of said city or county; such limitation as to the number of probation officers shall not apply to courts of record in cities having a population of two hundred fifty thousand or more wherein the provisions of act number three hundred sixty-nine of the public acts for the year nineteen hundred nineteen, or any amendment thereto has been or may be adopted: *Provided further,* That in cities where there are two or more courts each having different jurisdictions the judge of each such court shall recommend the probation officer or officers for his own court, and where there are two or more judges of any such court, they shall jointly recommend the probation officer or officers for their own court: *Provided further,* That when a judicial circuit shall consist of more than one county, the court may recommend at least one assistant probation officer for each county which officer shall be appointed by the governor.

Proviso, number.

Further proviso.

Further proviso.

Notice, to whom given.

SEC. 8. Notice of the appointment of any chief probation officer or of any assistant probation officer shall be given in writing to the commissioner of public welfare within thirty days after such appointments shall be made.

Oath of office.

SEC. 9. Before entering upon the duties of his office, each probation officer shall take and subscribe the constitutional

oath of office, which oath shall be filed in the office of the secretary of state.

Governor may remove.

SEC. 10. The governor shall have the power to remove such officer or officers for incompetency, misconduct or failure to carry out the orders of the court, or neglect of any duty imposed by the court. Such removal may be made upon the certification of the judge or judges of the court under whom such probation officer acts, which certificate shall set forth that a full hearing has been had before said judge or judges and as a result thereof the court has determined that such probation officer is incompetent or has been guilty of misconduct, neglect of duty or refusal to carry out the order of the court.

May be deputy sheriffs, etc.

SEC. 11. Probation officers in counties having a population of more than fifty thousand shall not be members of a regular police force, but may be deputy sheriffs or constables.

Salary, how paid.

SEC. 12. The salary and necessary expenses of the chief probation officer and each assistant probation officer shall be paid monthly out of the treasury or treasuries of the county or counties composing the circuit within which such probation officer or officers shall act, where provision has been made by the board of supervisors of such county or counties for their payment; if such probation officer is appointed by a criminal court of record of general jurisdiction of any city, out of the treasury of the county in which said city is located, where provision for their payment has been made by the board of supervisors of the county in which said city is located; if said probation officer is appointed by a municipal or police court, out of the treasury of the city in which such municipal or police court is located, where provision for payment has been made by the commission or common council of such city. Said salary and expense shall be paid by the city or county treasurer upon an order of the clerk of the court, properly audited by the officer or board of the city or county in whom the power or duty of auditing accounts is vested.

Gratuity, etc., unlawful to receive.

SEC. 13. Any probation officer receiving compensation from any public funds under the provisions of this act, who shall receive any compensation, gift or gratuity whatever from any person under probation or from any person, firm or corporation for doing or refraining from doing any official act in any way connected with his work as probation officer, or in any way connected with any proceeding then pending or about to be instituted in any court with which said probation officer has to do, shall be deemed guilty of a misdemeanor and may be punished accordingly.

Duties.

SEC. 14. Every probation officer when so directed by the court shall inquire into the antecedents, character and circumstances of any person or persons accused within the jurisdiction of such court, and shall report thereon in writing to such court or magistrate. He shall preserve complete and accurate records of cases investigated by him and of all cases placed in his care by the court and of any other duties per-

formed by him. He shall take charge of and watch over all persons placed on probation under such regulations as may be prescribed by the court, and shall give to such probationer full instructions as to the terms of his release upon probation.

May act as parole officer, etc.

SEC. 15. Any probation officer may act as parole officer for any penal or reformatory institution in this state when so requested by the authorities thereof, or may act as county agent when regularly appointed as such, and may act as probation officer for the several probate courts of the state in juvenile cases when so appointed, and may act as "friend of the court" as defined in act number four hundred twelve of the public acts of nineteen hundred nineteen, when so appointed.

Who to supervise work of.

SEC. 16. The commissioner of public welfare shall prescribe the form of all records and of all reports from probation officers, exercise general supervision over the work of the probation officers throughout the state, and may require detailed reports from probation officers throughout the state. The department of public welfare shall include in its printed reports a report of the probation work of the courts of the state for the period covered by such printed report. The necessary expense incurred in the printing and distributing of blanks required by section fourteen of this chapter and in securing and supervising reports of probation officers, shall be audited by the board of state auditors and paid from the general fund.

Act not repealed.

SEC. 17. Nothing in this chapter shall be construed as limiting or repealing act number six of the public acts of the extra session of nineteen hundred seven, and amendments thereto.

CHAPTER XII.

Proceedings to Prevent Crime.

Powers of judges, etc.

SECTION 1. The justices of the supreme court, the several circuit judges, judges of courts of record having jurisdiction of criminal causes, circuit court commissioners, all mayors and recorders of cities, and all justices of the peace, shall have power to cause all the laws made for the preservation of the public peace to be kept and in the execution of this power may require persons to give security to keep the peace in the manner provided in this chapter.

When complaint made in writing.

SEC. 2. Whenever complaint shall be made in writing and on oath to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced, on oath, to reduce such examination to writing and to cause the same to be subscribed by the parties so examined.

Warrant, when issued.

SEC. 3. If it shall appear from such examination, that there is just reason to fear the commission of any such offense, such magistrate shall issue a warrant under his hand,

directed to the sheriff or any constable of the county, reciting the substance of the complaint and commanding him forthwith to apprehend the person so complained of, and bring him before such magistrate.

Trial. SEC. 4. When the party complained of is brought before the magistrate, he may demand that the truth of the accusation shall be determined either by a trial before such magistrate, or a jury; and the trial thereof, and the selection of a jury shall be as in criminal cases, which justices of the peace are authorized to try; and if the magistrate or jury upon such trial shall find the accused guilty, the magistrate may require the accused to enter into a recognizance, with sufficient sureties, to be approved by such magistrate, in such sum as he shall direct, to keep the peace towards all the people of this state, and especially towards the person requiring such sureties, for such term as he may order not exceeding two years; and it shall be competent for the magistrate or the jury to find and return a special verdict that the complaint and accusation are groundless or malicious, and if they shall so find, it shall be the duty of the magistrate to enter such finding or verdict upon his docket.

Recognizance.

When discharged. SEC. 5. Upon complying with the order of the magistrate, the party complained of shall be discharged.

Refusal to recognize. SEC. 6. If the person so ordered to recognize shall refuse or neglect to comply with such order, the magistrate shall commit him to the county jail during the period for which he was required to give security, or until he shall so recognize, stating in the warrant the cause of commitment with the sum and the time for which such security was required.

When complaint unfounded, etc. SEC. 7. If upon examination it shall not appear that there is just cause to fear that any such offense will be committed by the party complained of, he shall forthwith be discharged; and if the magistrate shall deem the complaint unfounded, frivolous or malicious, he shall order the complainant to pay the costs of the prosecution, who shall thereupon be answerable to the magistrate and the officers for their fees, as for his own debt, and execution may issue therefor.

Costs, payment of. SEC. 8. When no order respecting the costs is made by the magistrate, they shall be allowed and paid in the same manner as costs before justices in criminal prosecutions; but in all cases where a person is required to give security to keep the peace, the court or magistrate may further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid or he is otherwise legally discharged.

Appeal. SEC. 9. Any person aggrieved by the order of any justice of the peace, requiring him to recognize as aforesaid may, on giving the recognizance to keep the peace required by such order, appeal to the circuit court for the same county.

May affirm order. SEC. 10. The court before which such appeal is prosecuted may affirm the order of the justice or discharge the appellant or may require the appellant to enter into a new recognizance

with sufficient sureties, in such sum and for such time, not exceeding two years, as the court shall think proper and may also make such order in relation to the costs of the prosecution as may be deemed just.

Appeal, failure to prosecute.

SEC. 11. If any party appealing shall fail to prosecute his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, without an affirmation of the judgment or order of the justice, and shall also stand as a security for any costs which shall be ordered by the court appealed to, to be paid by the appellant, a condition to that effect to be incorporated in all recognizances given under section eight of this chapter.

When discharged.

SEC. 12. Any person committed for not finding sureties, or refusing to recognize, as required by the court or magistrate, may be discharged by any judge, circuit court commissioner or justice of the peace on giving such security as was required.

Recognizance, to whom transmitted.

SEC. 13. Every recognizance taken pursuant to the foregoing provisions, shall be transmitted by the magistrate to the clerk of the circuit court for the county, within twenty days after the taking thereof, and shall be filed by such clerk.

When penalty adjudged forfeited.

SEC. 14. Whenever upon a suit brought on any recognizance entered into in pursuance of this chapter, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty on the petition of any defendant, as the circumstances of the case shall render just and reasonable.

Surrender of principal.

SEC. 15. Any surety in a recognizance to keep the peace, shall have the same authority and right to take and surrender his principal as in other criminal cases, and upon such surrender shall be discharged and exempt from all liability for any act of the principal subsequent to such surrender (except as to costs on any appeal taken by the principal in the recognizance) which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace or circuit court commissioner for the residue of the term, and shall thereupon be discharged.

CHAPTER XIII.

Proceedings for the Discovery of Crime.

Inquests.

SECTION 1. Justices of the peace shall, subject to the provisions of this chapter, take inquests upon the view of the dead bodies of such persons as shall have come to their death suddenly, or by violence, and of such persons as shall have died in prison.

May summon jurors.

SEC. 2. As soon as any justice of the peace shall have notice of the dead body of any person found or lying within the county, who is supposed to have come to his death in any manner described in the preceding section and the petition of not less than five citizens, none of whom shall be a constable

or deputy sheriff of the township, city or village, in which the dead body may be lying, shall have been filed with said justice praying that an inquest be had in such case or on the written request of the prosecuting attorney of the county or the attorney general, he shall forthwith summon six good and lawful men, electors of the county to appear before him, at such place as he shall appoint within said county.

Oath.

SEC. 3. When the jurors thus summoned have appeared, the justice of the peace shall call over their names and there, in view of the dead body, shall administer to them an oath or affirmation in substance as follows: "You do solemnly swear (or affirm as the case may be), that you will diligently inquire in behalf of the people of this state, when, in what manner and by what means, the person whose body lies here dead, came to his death and that you will make a true inquest thereof according to your knowledge and such evidence as shall be laid before you."

May subpoena witnesses.

SEC. 4. The justice of the peace may issue subpoenas for witnesses returnable forthwith or at such time and place as he shall therein direct; and the attendance of the persons served with such subpoenas may be enforced in the same manner and they shall be subject to the same penalties as if they had been served with a subpoena in behalf of the people of this state, to attend a justice's court: *Provided,* That in all such cases it shall be lawful for the magistrate holding any such inquest, to require by subpoena the attendance of a competent physician or surgeon for the purpose of making a post-mortem examination and of testifying as to the result of the same; and he may also employ a chemist in cases affording reasonable ground of suspicion that death has been produced by poison and the amount of compensation for the attendance and services of such physician, surgeon or chemist shall be audited and allowed by the board of supervisors of the proper county, or board of county auditors in counties having such board.

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Oath administered.

SEC. 5. An oath or affirmation to the following effect shall be administered to each witness by the justice of the peace: "You do solemnly swear (or affirm) that the evidence you shall give at this inquest, concerning the death of the person here lying dead, shall be the truth, the whole truth and nothing but the truth."

Testimony reduced to writing.

SEC. 6. In all cases where any murder or manslaughter is supposed to have been committed, the testimony of all witnesses examined before the inquest, shall be reduced to writing by the justice of the peace, or some other person by his direction and subscribed by the witnesses.

Inquisition, what to certify.

SEC. 7. The jury, upon the inspection of the dead body, and after hearing the testimony of the witnesses and making all needful inquiries, shall draw up and deliver to the justice of the peace their inquisition under their hands, in which they shall find and certify when, in what manner and by what means the deceased came to his death, and his name, if known,

together with all the material circumstances attending his death; and if it appear that he came to his death by unlawful means, the jurors shall forthwith state who if known was guilty, either as principal or accessory, or was in any manner the cause of his death.

Form of.

SEC. 8. Such inquisition to be called a coroner's inquest, may be in substance in the following form:

County of , ss.

An inquisition taken at , in said county, on the day of , before , one of the justices of the peace of the said county, upon the view of the body of (or a person), there lying dead, by the oaths of the jurors whose names are hereto subscribed, who being sworn to inquire in behalf of the people of this state, when, in what manner and by what means the said (or person) came to his death, upon their oaths, say (then insert when, where, in what manner, and by what means, persons, weapons or instruments he was killed or came to his death.) In testimony whereof the said justice of the peace and the jurors of this inquest, have hereunto set their hands the day and year aforesaid.

When returned to circuit court.

SEC. 9. If the jury find that any murder, manslaughter or assault had been committed upon the deceased, the justice of the peace shall forthwith return to the circuit court of said county the inquisition, written evidence and examinations by him taken.

Warrant, when issued.

SEC. 10. If any person charged by the inquest with having committed any such offense shall not be in custody, the justice of the peace shall have power to issue process for his apprehension, and such warrant shall be made returnable before him or any other magistrate or court having cognizance of the case, who shall proceed thereon in the manner that is required of magistrates in like cases.

When body buried.

SEC. 11. When any justice of the peace shall take an inquest upon the dead body of a stranger, or being called for that purpose shall not think it necessary, on view of such body, that an inquest should be taken, he shall cause the body to be decently buried; and if the justice of the peace shall certify that, to the best of his knowledge and belief, the person found dead was a stranger not belonging to this state, the expenses of the burial, with the justice's fees, and all the expenses of the inquisition, if any were taken, shall be paid to the justice of the peace from the state treasury, the account of such expenses and fees being first allowed by the circuit court for the county; in all other cases the expenses and fees shall be paid by the county in which the inquisition was taken:

Expenses of.

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Provided, That when an inquest is held on the body of any person who dies in any prison or public reformatory of this state, the expense of such inquest shall be audited and paid by the state, as other charges against the state are audited and paid.

Coroner may hold inquest.

SEC. 12. Any coroner shall have power to hold inquests anywhere within the county for which he shall be elected, and all provisions of law relating to the holding of inquests and the disinterment of dead bodies for the purpose of holding inquests thereon by justices of the peace, are hereby made applicable to inquests so held by coroners; and all powers by the general laws of this state conferred upon justices of the peace relative to such inquests are hereby conferred upon such coroners. All powers conferred upon peace officers by the general laws of this state are hereby conferred upon such coroners.

May employ surgeon, etc.

SEC. 13. Any coroner or justice of the peace holding such inquest, shall have power to summon the attendance of a competent surgeon, whenever he shall deem such attendance necessary, and a chemist may be employed in cases affording reasonable ground of suspicion that death has been produced by poison. Any chemist or surgeon so employed shall, upon the certificate of the coroner acting in the case, receive such compensation for his or their services as shall be allowed by the county auditors of counties having a board of auditors or the supervisors of other counties, as is otherwise provided by law.

When justice not to hold inquest.

SEC. 14. It shall not be competent for justices of the peace, within the incorporated cities of this state in which a county coroner resides, to hold inquests on the view of dead bodies unless both of the coroners of the county in which they are situate shall be absent, or incapacitated to act from illness or otherwise; but such inquests, within said city, shall be held by one of the coroners elected for the county in which such cities are severally situate, whenever in the judgment of such coroner, an inquest shall be necessary and that the coroners' juries shall consist of six persons only.

To examine complainant.

SEC. 15. Whenever complaint in writing and upon oath shall be made to any justice of the peace that any person has died and that such person was buried in the county where such justice resides, and specifying in what township or city said person was buried, and containing a further statement that the complainant knows or has good reason to believe that the said deceased person came to his or her death by means of poison or violence, or in consequence of any criminal act committed by any person known or unknown, it shall be the duty of such justice to examine the complainant and such witnesses as may be produced by him on oath and reduce the same to writing and if such justice shall be satisfied from such examination that there is just cause to believe that the deceased person named or described in such complaint came to his or her death by means of poison or violence, or in consequence of any criminal act, and that a post-mortem examination of the body of such deceased person is necessary or will materially aid in the prosecution of any person charged or who may be charged with any criminal act resulting in the death of such deceased person, it shall be the duty of such justice

Post-mortem.

of the peace to issue an order under his hand, directed to the sheriff of the county, commanding such sheriff, in the name of the people of the state of Michigan, forthwith to proceed with his undersheriff, or one of his deputies, to the place where such body was buried, and to disinter and remove the body to some suitable and convenient place in the township or city where such body was buried for the purpose of holding an inquest over the same; and said justice shall also proceed at once to summon a jury of inquest in the same manner as is in this act provided and as soon as the sheriff shall have removed such body to a suitable place as above provided, the justice as well as the jury so summoned, shall proceed in the same manner and shall have and exercise the same powers and duties as prescribed in this act.

Body disinterred.

Reinterment.

SEC. 16. As soon as the inquest shall have been completed, as provided for in the preceding section, the sheriff shall at once cause the body of the deceased person to be reinterred in the same place from whence he removed the same.

Money, etc., found upon body.

SEC. 17. Whenever any money or valuable property shall be found upon the body of an unknown deceased person within this state, it shall be the duty of the coroner or justice holding the inquest over said body, or of any person who shall come into possession of said money or valuable property, to deliver all of said money or valuable property so found to the county clerk of the county where said body shall be found or be at the time of death, within ten days after said money or property shall have come into his possession.

Deposit of, by clerk.

SEC. 18. It shall be the duty of said county clerk to deposit the same with the county treasurer, who shall safely keep said money or property for the period of two years from the time of receiving the same, unless the same shall be called for by the heirs or proper representatives of the deceased person, in which case the said money or valuable property shall be delivered to them, but if at the expiration of said two years no demand for the same shall have been made, said county treasurer shall sell the same in such manner and after such notice as is required by law for constable sales, and shall within ten days thereafter pay into the state treasury all the proceeds to be credited to the general fund of the state.

Sudden deaths without medical attendance.

SEC. 19. It shall be the duty of any physician and of any person in charge of any hospital or institution, or of any person who shall have first knowledge of the death of any person who shall have died suddenly, accidentally, violently or as the result of any suspicious circumstances or without medical attendance up to and including at least thirty-six hours prior to the hour of death, or in any case of death due to what is commonly known as an abortion, whether self-induced or otherwise, to immediately notify the coroner of the death. It shall be unlawful for any undertaker, embalmer or other person to remove any body from the place where such death occurred, or to prepare same for burial or shipment,

without first notifying the coroner and receiving permission to remove the body.

Moneys, etc., turned over to coroner.

SEC. 20. All moneys or effects that shall be upon the person of the deceased at the time of death or prior to the death, shall be turned over to the coroner whose duty it shall be to make a record of the sums and a listing of other effects in the property book and retain the same in the coroner's office until the coroner shall be able to deliver such property and effects to the personal representatives of the deceased or dispose of the same as otherwise provided by law.

When inquest deemed necessary.

SEC. 21. Where, in the discretion of the prosecuting attorney, an inquest is deemed necessary, the coroner upon the written order of the prosecuting attorney, shall summon six men all of whom shall be citizens of the United States, residents of the county, and shall administer the oath as provided for by this chapter except that the jurors need not view the body of the deceased.

Misdemeanor, what deemed.

SEC. 22. Any persons who shall fail to comply with the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not to exceed one hundred dollars or to be imprisoned in the county jail for a period not to exceed ninety days or both.

Provisions not repealed.

SEC. 23. Nothing herein contained shall be construed to repeal any of the provisions of act three hundred forty-five of the public acts of nineteen hundred nineteen, or any acts amendatory or supplementary thereto.

CHAPTER XIV.

Jurisdiction and Procedure of Justices' Courts in Criminal Cases.

Jurisdiction of justices' courts.

SECTION 1. Any justice of the peace shall have power to hold a court subject to the provisions hereinafter contained, to hear and determine charges for all offenses arising within his county punishable by fine not exceeding one hundred dollars, or punishable by imprisonment in the county jail not exceeding three months, or punishable by both said fine and imprisonment; and any justice of the peace is empowered and authorized to perform all official acts and duties and to exercise jurisdiction in criminal causes in any township or city situate in the county within which the justice of the peace was elected and qualified, with the same rights and powers as though performed and exercised within the city or township in which such justice of the peace was elected and qualified: *Provided*, That whenever in any criminal case, tried before any justice of the peace, the defendant shall be adjudged guilty and punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be adjudged altogether void nor be wholly reversed and annulled, but the same shall be

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valid and effectual to the extent of the lawful penalty and shall be reversed and annulled only in respect to the lawful excess.

Docket entry in criminal cases.

SEC. 2. Justices of the peace of townships, police justices of incorporated villages and cities of this state, and other officers exercising the jurisdiction of justices of the peace, shall make a full and complete docket entry of the proceedings in each and every criminal case brought before them in a similar manner as is now required by law in civil cases.

To be public records.

SEC. 3. The dockets containing the entries as provided for in the preceding section of this act, shall be public records and subject to inspection and examination at all times and shall be delivered, together with the civil docket and other books and files, to the successors in office of the respective officers herein named, and when filled shall be filed in the office of the county clerk to be and remain a public record.

Examination by justice.

SEC. 4. Upon complaint made to any justice of the peace, by any constable or other person that any offense cognizable by a justice of the peace, has been committed within the county, he shall examine the complainant on oath and witnesses produced by him, and shall reduce the complaint to writing and cause the same to be subscribed by the complainant, and if it shall appear that such offense has been committed, the said justice shall issue his warrant reciting the substance of the complaint, and requiring the officer to whom it is directed forthwith to arrest the accused and bring him before such justice or some other justice of the same county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be named therein, to appear and give evidence at the trial.

Plea.

SEC. 5. The charge made against the accused, as stated in the warrant of arrest, shall be distinctly read to him at the time of his arraignment and he shall be required to plead thereto, which plea the court shall enter in its minutes; if the accused refuse to plead, the court shall enter the fact with a plea of not guilty in behalf of such accused in its minutes.

When issue tried.

SEC. 6. If the plea of the accused be not guilty, and he waive trial by jury the said court shall proceed to try such issue and to determine the same according to the evidence which may be produced against and in behalf of such accused.

Judgment rendered.

SEC. 7. If the accused shall plead guilty to such charge the court shall thereupon render judgment thereon.

When tried.

SEC. 8. On the return of the warrant with the accused, if he shall plead not guilty or refuse to plead to the charge in the warrant, the said justice shall proceed to hear, try and determine the cause within ten days after the return of the same, unless the absence of witnesses from the county without the fault or connivance of the party seeking such continuance shall render such continuance necessary, or unless the sickness of witnesses or of the accused shall render a continuance of such cause necessary; in which case it shall and may be competent for the justice to adjourn or continue the same for

such time as may be necessary to secure the ends of justice: *Provided,* That in case of the absence of witnesses the party seeking to obtain a continuance for that cause shall further show to the satisfaction of the court that he has used due diligence to obtain the testimony of such witness. Such showing shall be the same as is required in civil cases. Proviso.

SEC. 9. Any justice of the peace may issue subpoenas to compel the attendance of witnesses and may administer all necessary oaths. Subpoena witnesses.

SEC. 10. In case any person summoned to appear before any court held by a justice of the peace pursuant to the provisions of this chapter, as a juror or witness shall fail to appear, or if any witness appearing shall refuse to be sworn or to testify, he shall be liable to the same penalties and may be proceeded against in the same manner as provided by law in respect to jurors and witnesses in justices' courts in civil proceedings. Failure to appear, etc.

SEC. 11. From the time of the return of the warrant until the time of the trial the accused may give bail with one or more sufficient sureties for his appearance at the time fixed for the trial, or in the event of failure so to do, may be committed to jail for safe keeping by warrant of said justice, or left in custody of the arresting officer. Bail.

SEC. 12. After the joining of issue, and before the court shall proceed to an investigation of the merits of the cause, and the accused shall not have waived his right to a trial by jury, thereupon the court shall direct the sheriff, or any constable of the county, to make a list in writing of the names of eighteen inhabitants of the county, qualified to serve as jurors in the courts of record in this state, from which list the complainant and accused may each strike out six names: *Provided,* That no such officer shall make out said list if he be complainant in said cause or in any wise interested, nor shall the jury consist of less than six persons. Jury. Proviso.

SEC. 13. In case the complainant or the accused shall neglect to strike out such names, the court shall direct some suitable disinterested person to strike out the names for either or both the parties so neglecting; and upon such names being struck out, the justice shall issue a venire directed to the sheriff, or any constable of the county, requiring him to summon the six persons whose names shall remain upon such list to appear before such court, at the time and place to be named therein, to make a jury for the trial of such offense. To issue venire.

SEC. 14. The officer to whom such venire shall be delivered shall summon such jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire, and return the same with such venire to the court within the time therein specified. Summoning of jurors.

SEC. 15. If any of the jurors named in such venire shall fail to attend in pursuance thereof, or if there shall be any legal objection to any that shall appear, the court shall supply the deficiency by directing the sheriff or any constable who Failure to attend.

may be present and disinterested, to summon any of the bystanders or others who may be competent and against whom no cause of challenge shall appear, to act as jurors in the cause.

Former service cause of challenge.

SEC. 16. It shall be a good cause of challenge to any juror in any justice or police court in any city, township or village in this state, in addition to the other causes of challenge allowed by law, that such person has served as a juror in any justice or police court in any such city, township or village in this state two times within one year previous to such challenge.

Challenges.

SEC. 17. In all criminal cases the attorney appearing for the people may challenge five jurors peremptorily and the defendant may challenge five jurors peremptorily; and the attorney appearing for the people may challenge five talesmen peremptorily and the defendant may challenge five talesmen peremptorily.

When new jury summoned.

SEC. 18. If the officer to whom the venire shall have been delivered shall fail to return the same as thereby required, or if the jury shall fail to agree and shall be discharged by the court, a new jury shall be selected and summoned in the same manner and the same proceedings shall thereupon be had, as herein prescribed in respect to the first jury, unless the accused shall consent to be tried by the court, in which case the court shall proceed to the trial of the issue, as if no jury had been demanded.

Oath.

SEC. 19. To each juror shall administer the following oath or affirmation: "You do solemnly swear (or, "You do solemnly and sincerely declare and affirm", as the case may be) that you will well and truly try this cause between the people of the state of Michigan and....., the accused, and a true verdict give according to law and the evidence given you in court, unless discharged by the court, so help you God."

To hear proofs, etc.

SEC. 20. After the jury shall have been sworn they shall sit together and hear the proofs and allegations in the case, which shall be delivered in public and in the presence of the accused; and after hearing such proofs and allegations, the jury shall be kept together in some convenient place, until they agree on a verdict, or are discharged by the court, and a sheriff or constable shall be sworn to take charge of the jury, in like manner as upon trials in justices' courts in civil proceedings.

Verdict, delivery, etc.

SEC. 21. When the jurors have agreed on their verdict they shall deliver the same to the court, publicly, who shall enter it in the minutes of its proceedings, and the jurors shall each be entitled to the same fees as are or may be provided by law for jurors sworn in civil cases before justices of the peace, and a certificate thereof from the justice in whose court such jurors served, countersigned by the prosecuting attorney of the county, given to each of said jurors, shall authorize the county clerk of the county to draw an order upon the

county treasurer for the payment of the fees of such juror, which order shall be paid in like manner as jurors' fees in courts of record are paid.

Judgment rendered.

SEC. 22. Whenever the accused shall be tried and found guilty, either by the court or by a jury, or shall be convicted of the charge made against him upon a plea of guilty, the court shall render judgment thereon and inflict such punishment, either by a fine or imprisonment or both as the nature of the case may require, together with such costs of prosecution as the justice of the peace shall order; but such punishment shall in no case exceed the limit fixed by law for the offense charged, and in rendering such judgment and inflicting such punishment the court may award against such offender a conditional sentence, and order him to pay a fine with or without the costs of prosecution, within a limited time, to be expressed in the sentence and in default thereof to suffer such imprisonment as is provided by law and awarded by the court, in all cases where the offender shall be convicted of an offense punishable at the discretion of the court, either by fine or imprisonment or both.

Acquittal.

SEC. 23. Whenever the accused shall be acquitted, he shall be immediately discharged; and if the court before whom the trial is had shall certify in its minutes that the complaint was wilful and malicious and without probable cause, it shall be the duty of the complainant to pay all the costs that shall have accrued to the court and the sheriff or constable and jury in the proceedings had upon such complaint, or to give satisfactory security by bond to the people of the state, with one or more sureties to pay the same in thirty days after the said trial.

Refusal to pay costs, etc.

SEC. 24. If the complainant shall refuse or neglect to pay such cost or to give such security, the court may forthwith enter judgment against him for the amount of such costs and forthwith issue execution thereon, in the same manner and with the like effect as in case of an execution issued by a justice of the peace on a judgment in an action for a trespass or other wrong; and such moneys when collected shall be paid over to such court and be applied to the payment of the costs for which the judgment was rendered.

Judgment execution.

SEC. 25. The judgment of every such court shall be executed by the sheriff or any constable of the county where the conviction shall be had, by virtue of a warrant under the hand of the justice who held the court, to be directed to such officers and specifying the particulars of such judgment.

Fines, disposition of.

SEC. 26. All fines imposed by any such court, if paid before the accused is committed, shall be received by the magistrate who constituted the court before which the accused was convicted, and by such magistrate paid over to the county treasurer, within thirty days after the receipt thereof, to be distributed according to law.

When accused committed.

SEC. 27. If the accused be committed, payment of any fine or costs imposed on him shall be made to the sheriff of the

county who shall, within thirty days after the receipt thereof, pay over the same to the county treasurer for the purpose aforesaid.

Neglect to pay.

SEC. 28. If any person who shall have received any such fine or costs or any part thereof, shall neglect to pay over the same pursuant to the foregoing provisions, it shall be the duty of the county treasurer immediately to commence a suit therefor, in the name of the people of the state of Michigan, and to prosecute the same diligently to effect. Any person neglecting to pay over such fine to the county treasurer within sixty days after receiving the same, shall be deemed guilty of a misdemeanor and on conviction thereof shall pay a fine of not less than fifty nor more than one hundred dollars or be imprisoned in the county jail of such county not less than thirty nor more than ninety days, or both, in the discretion of the court: *Provided,* That all justices of the peace shall keep an exact record of all proceedings had before them, and failing to do so, shall be liable to the same penalties as above.

Proviso.

Certificate of conviction.

SEC. 29. Whenever any conviction shall be had before a court held by a justice of the peace, the justice shall make a certificate of such conviction under his hand in which it shall be sufficient briefly to state the offense charged, and the conviction and judgment thereon, and if any fine has been collected, the amount thereof.

Where filed.

SEC. 30. Within twenty days after such conviction, the said magistrate shall cause such certificate to be filed in the office of the clerk of the county in which the conviction shall have been had.

Certified copy evidence in courts.

SEC. 31. Every certificate of conviction made and filed under the foregoing provisions, or a duly certified copy thereof, shall be evidence in all courts and places of the facts therein contained.

Report of justice, what to embrace.

SEC. 32. Within ten days after the final disposition of any criminal or other proceedings before any justice of the peace, to which the people of this state are a party, or wherein the county may be liable for any costs, it shall be the duty of the justices before whom such proceedings shall be had to make a report of the same to the prosecuting attorney of the county, which report shall embrace the following items: The title, or the case; the date of filing complaint; the offense charged; the plea; the names of attorneys or others who appear to prosecute or defend; the date of the trial, examination or hearing; the verdict or findings and any certificate made by the court as to the probable cause for making the complaint; the names and attendance of jurors, and the names, mileage and attendance of witnesses sworn, and an itemized statement of the officers' and court fees and how the same were disbursed, if paid to such justice. The prosecuting attorney shall, immediately after making his annual report to the attorney general, file said report with the county clerk. It shall also be the duty of every justice of the peace to issue to each juror impaneled in any such proceedings a certificate of his at-

Where filed.

tendance of such juror and the amount of fees to which he is entitled, and deliver the same to such juror at once upon the discharge of the jury, and also to issue to each witness subpoenaed by the people upon his proving his mileage and attendance as provided by law, a certificate of the same. The prosecuting attorney shall furnish to justices suitable blanks for such reports and certificates, and the actual expense of procuring the same shall be audited by the board of supervisors and paid in the same manner as other contingent claims against the county.

Failure of justice to make report.

SEC. 33. In case any justice of the peace shall neglect or refuse to make a report to the prosecuting attorney within twenty days after the disposition of any such proceeding before him, as herein provided, he shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be punished by a fine of twenty-five dollars and shall forfeit all right to any fees for his services in every proceeding in which he so neglects or refuses to make such report.

Appeal.

SEC. 34. The person so charged with and convicted by any such justice of the peace of any such offense, may appeal from the judgment of such justice of the peace to the circuit court: *Provided,* That such person shall enter into a recognizance to the people of the state of Michigan in a sum not less than fifty nor more than five hundred dollars within ten days after the rendition of the judgment, with one or more sureties, conditioned to appear before said court on the first day of the next term thereof to prosecute his appeal at said term to effect and to abide the orders and judgment of said court; and the justice from whose judgment an appeal is taken shall thereupon discharge the person so convicted or order his discharge, shall make a special return of the proceedings had before him and shall cause the complaint, warrant and the return together with the recognizance and the testimony taken by him, to be filed in the said circuit court on or before the first day of the circuit court next to be holden for said county. In case there shall be any objections to the complaint, warrant or other proceedings and the decision of the justice thereon which would not be allowed to be made on the trial of the appeal, the same may be set forth specifically in such recognizance. Such justice shall in addition to his return as required by this section, make a full and complete return as to all matters specifically mentioned in such recognizance, and the same shall be deemed issues of law for the determination of such circuit court.

Proviso, recognizance.

Writ of certiorari.

SEC. 35. A writ of certiorari to remove into the circuit court of the proper county a conviction had before a justice of the peace, may be allowed by the circuit judge or the circuit court commissioner on the application of the party convicted. The party desiring such certiorari or someone in his behalf, shall apply for the same within twenty days after such conviction shall have been had and shall make an affidavit specifying the alleged error or errors complained of.

Allowance, when made.

SEC. 36. If the person to whom application for such certiorari be made, shall be satisfied that error has been committed in the proceedings or judgment, he shall indorse upon the affidavit his allowance thereof.

Service of.

SEC. 37. The writ of certiorari and affidavit shall be served upon the justice before whom such conviction was had within ten days after said allowance, and the justice shall make a return to all the matters specified in such affidavit and shall cause such writ, affidavit and return to be filed in the office of the county clerk of the county within ten days after the service of such writ.

When sentence suspended.

SEC. 38. After the service of the writ of certiorari as provided in the preceding section, if the party convicted shall enter into recognizance with surety or sureties satisfactory to such justice or to the person allowing the certiorari, conditioned that he will appear at the next term of the circuit court to be held in and for said county and abide the order and determination of the court, the justice shall order that the sentence be suspended; and if the defendant shall have been committed to jail on such sentence, the justice shall order the jailer to set such prisoner at liberty, who is hereby required to comply with such order. The person receiving such recognizance shall within twenty days thereafter, cause the same to be deposited with the county clerk.

Return of amended writ, etc.

SEC. 39. The circuit court shall have power to compel a return or an amended or further return to all writs of certiorari issued under the provisions of this act.

When appearance not required, etc.

SEC. 40. It shall not be necessary for the defendant to appear in the said circuit court upon the prosecution of such certiorari unless the court otherwise direct; nor shall any assignment or rejoinder in error be necessary but the said court shall proceed to hear the parties and give judgment on the return made to such writ of certiorari as the right of the matter may appear.

Notice of argument.

SEC. 41. At least four days' notice of argument upon any such matter shall be given to the prosecuting attorney of the county where the offense was committed, before the time at which a hearing is intended to be had.

May require new recognizance, etc.

SEC. 42. The circuit court in which the person recognized shall be bound to appear, shall have power to continue such recognizance or to require a new recognizance with further or other security until a decision shall be had in such case; and in default thereof, the same court may commit the party so convicted to close confinement.

When defendant discharged, etc.

SEC. 43. If the conviction and judgment of the justice be reversed, the circuit court shall discharge the defendant; but if the judgment of such justice be affirmed, the said circuit court shall order that such sentence be executed; and if the defendant shall have been let out of prison as hereinbefore provided, he shall be remanded back to such prison for the length of time that remained unexpired of his sentence at the period he was so let out of prison.

SEC. 44. If at any time it shall appear to the said circuit court that the person prosecuting such certiorari has unreasonably delayed bringing on such cause for argument, the court may enter an order to quash such certiorari, and may also direct the sentence of the justice to be carried into effect. May quash certiorari.

SEC. 45. The following fees shall be allowed and paid under the provisions of this chapter for the services herein named: For making return to writ of certiorari, two dollars. Fees.

CHAPTER XV.

Fees.

SECTION 1. For the following services hereafter performed, in the cases authorized by law, the officers hereinafter named shall be allowed, respectively, the fees in this chapter directed.

SEC. 2. For taking a complaint on oath, forty cents; a warrant, forty cents; for entering any cause upon the docket, forty cents; a bond or recognizance, forty cents; for approving the same, fifteen cents; issuing a subpoena (not exceeding four in any one case), fifteen cents; for certifying cause to other magistrates or court, twenty-five cents; for commitment or mittimus, forty cents; for an adjournment, twenty-five cents; for certificate of conviction to file with the clerk, forty cents; for making and filing return on appeal, or where a party is bound over to the circuit court, or any other court having concurrent jurisdiction, one dollar and fifty cents; for notifying county agent for the care of juvenile offenders of the pendency of the case against any juvenile offender, forty cents; for each arraignment and receiving a plea of guilty, in case such plea is entered, one dollar and fifty cents; for each arraignment where the plea of not guilty is entered, or where examination is waived or demanded, one dollar and fifty cents; for holding examinations, including the taking of testimony and swearing of witnesses, and for the trial of any cause which shall include the swearing of all witnesses, the constable and jury, if one be called, also the judgment and record of any exceptions or motions made during the trial, five dollars per day for each day and two dollars and fifty cents for each one-half day while actually engaged in such examination or trial, or while engaged in hearing any motion relative to such trial or examination, or final disposition of any cause, but such per diem shall not be allowed until such examination or trial shall have been actually begun, and no justices of the peace shall receive any other fees or compensation for any services rendered in any criminal case than such as are hereinbefore provided. Complaint, warrant, etc.

SEC. 3. For serving a warrant or other process for the arrest of any person, issued by any magistrate or court, fifty cents; for traveling to make such service, going only, fifteen cents per mile, and where an arrest has been made, fifteen cents per mile return travel from the place of arrest to the Warrant for arrest, etc.

place of return; for taking a prisoner to jail or to the house of correction, fifteen cents per mile, going only; for serving a mittimus, fifteen cents; serving a subpoena, fifteen cents for each witness, and fifteen cents per mile for the distance actually and necessarily traveled in going to make such service; for summoning a jury, one dollar; for attending the same, one dollar; for attending any court by order of the magistrate or officer before whom a trial or examination is being held, when not in charge of a jury, two dollars per day for each day and one dollar for each half day so actually attending. The board of supervisors of each county may allow such further compensation for the services of process and the expenses and trouble attending the same as they shall deem reasonable. For other services in criminal cases, for which no compensation is especially provided by law, such sum as the board of supervisors shall allow.

Further compensation by supervisors.

Commitment to jail, etc.

SEC. 4. For every person committed to jail, thirty-five cents; for every person discharged from jail, thirty-five cents; for taking a prisoner before a court for examination or to jail, fifteen cents; for serving a subpoena, issued from a court of record, fifteen cents for each witness and ten cents for each copy of the same, and fifteen cents a mile on the distance actually and necessarily traveled in going to make such service; for serving a warrant or performing any other duty which may be performed by a constable, the same fees as are allowed by law to a constable for such service. For other services not herein specially provided for; such sums as may be allowed by the board of supervisors.

Fees of circuit court commissioners.

SEC. 5. For services rendered by circuit court commissioners in cases of prosecutions for felonies, or for requiring sureties of the peace, such circuit court commissioners shall be entitled to the same fees as are by law provided for similar services when performed in civil cases by a justice of the peace.

To be county charge.

SEC. 6. The fees hereinbefore in this chapter allowed for services, except those which are otherwise provided for by law, shall be county charges, and shall be audited by the board of supervisors of the county in which the services are rendered, and shall be paid in the same manner as other contingent charges of the county.

Expense of witnesses, when paid.

SEC. 7. Whenever any person shall attend any court of record as a witness in behalf of the people of this state, upon request of the public prosecutor, or upon subpoena, or by virtue of a recognizance for that purpose, and it shall appear that such person has come from any other state or territory of the United States, or from any foreign country or that such person is poor, the court may, by an order to be entered on its minutes, direct the county treasurer of the county in which the court may be sitting, to pay such witness such sum of money as shall seem reasonable for his expenses; and no fees shall be allowed or paid to witnesses on the part of the

people in any criminal proceeding or prosecution except as is provided in this section and act.

Clerk to certify.

SEC. 8. The clerk of the court by which such order shall be made, shall immediately make out and deliver a certified copy thereof to the person in whose favor the same is made, without any fee for such service.

Payment by treasurer.

SEC. 9. Upon the production of such certified copy to the county treasurer, or as soon thereafter as he shall have sufficient moneys in his hands, he shall pay to the person authorized to receive the same, or to his order, the sum of money so directed to be paid, which shall be allowed to the treasurer in his accounts.

Provisions applicable.

SEC. 10. The provisions of law prohibiting the taking of any fees for services in civil cases, other than such as are allowed by law, shall apply to the taking of fees in criminal cases beyond the amount allowed by law for such services.

Prosecuting attorney's fees.

SEC. 11. In all criminal prosecutions where an indictment shall be found and judgment for costs against the defendant shall be rendered, there shall be taxed for the use of the county the following fees for the services of the prosecuting attorney, to-wit: For drawing an indictment, two dollars; for trying the cause, four dollars; for arguing each motion in arrest of judgment, or for a new trial, two dollars; for services where exceptions are taken by defendant, two dollars; for every discharge of the prosecution on the acknowledgment of satisfaction in such cases as are authorized by law, two dollars.

Security for costs.

SEC. 12. In all prosecutions for any crime or misdemeanor, when the prosecution is at the instance of a private person, and not of some public officer or of the grand jury, such person shall give security for costs and if the defendant or prisoner be discharged on examination by such magistrate, or acquitted on trial, or a nolle prosequi be entered on the indictment by order of the court before which it may be pending, the complainant shall pay all costs which shall have accrued to the court, sheriff, constable and jury, and upon proceedings had upon such complaint, execution shall issue for the collection of such costs as in civil cases, as well against the surety as against the complainant, unless the magistrate or court before whom the complaint is made or trial is had, shall certify in his minutes that there was probable cause for the making of such complaint.

Witness fees.

SEC. 13. Whenever any person shall attend any court as a witness in behalf of the people of this state upon request of the public prosecutor, or upon a subpoena, or by virtue of any recognizance for that purpose, he shall be entitled to the following fees: For attending in a court of record, two dollars for each day and one dollar for each half day; for attending in a justice court or upon an examination, one dollar and fifty cents for each day, and seventy-five cents for each half day; and for traveling, at the rate of fifteen cents per mile in going to the place of attendance, to be estimated from the residence of such witness if within the state; if without the

state, from the boundary line which witness passed in going to attend the court.

Attendance proved.

SEC. 14. In courts of record such witness shall prove his attendance and travel in open court before the clerk, and in justice courts before the justice, on the day of trial, or upon an examination, and a certificate thereof from the justice, countersigned by the prosecuting attorney of the county, shall authorize the county clerk to draw an order upon the county treasurer for the payment of the fees of such witnesses attending such justice court as aforesaid, which order shall be paid by the said county treasurer in like manner as witness fees in courts of record are paid, and an order therefor from the clerk of such court of record shall authorize the county treasurer to pay the fees of witnesses attending such court of record as aforesaid in the same manner as the fees of jurors attending such courts are paid.

When unable to procure attendance of witness.

SEC. 15. If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

When unable to procure counsel.

SEC. 16. Whenever any person charged with having committed any felony or misdemeanor shall be unable to procure counsel, and the presiding judge shall appoint some attorney to conduct the defense, the attorney so appointed shall be entitled to receive from the county treasurer on the certificate of the presiding judge that such services have been duly rendered, such an amount as the presiding judge shall in his discretion deem reasonable compensation for the services performed.

Enlarged compensation, when to receive.

SEC. 17. An attorney shall not, in such case, be compelled to follow a case into another county or into the supreme court, but if he does so, may recover an enlarged compensation to be fixed by the court.

Attorney to file affidavit.

SEC. 18. Only one attorney in any one case shall receive the compensation above contemplated, nor shall he be entitled to this compensation until he files his affidavit in the office of

the county clerk, in which such trial or proceedings may be had, that he has not, directly or indirectly, received any compensation for such services from any other source.

Fees of interpreters.

SEC. 19. Whenever any person shall attend any court as an interpreter for the purpose of interpreting the testimony of any witness given in behalf of the people of this state, or for the purpose of translating or interpreting any writing or document introduced or used in any court in behalf of the people of this state, either upon request of the prosecuting attorney or by and with the consent of the presiding judge or justice of the peace, he shall receive such compensation as shall be ordered by said presiding judge or justice of the peace: *Provided,* That the compensation for such interpreter in the justice court shall not exceed the sum of five dollars for each day and the sum of two dollars and fifty cents for each one-half day actually employed. The certificate of the clerk of a court of record or of a justice of the peace stating the amount ordered to be paid as hereinbefore provided, shall authorize the county treasurer to pay the amount therein stated.

Proviso.

Malfeasance in office.

SEC. 20. The expenses of all prosecutions against persons holding or who may have held any state office, for malfeasance in office, shall be paid from the general fund, by the state treasurer, and the board of state auditors are hereby authorized and empowered to allow all just and legal claims for such prosecutions, and this section shall be deemed to apply to the expenses of any prosecutions already commenced, as well as to any which may occur in the future.

Criminal proceedings.

SEC. 21. Whenever the attorney general shall institute criminal proceedings in any county in this state, all costs incurred in such proceedings, except the pay of circuit judges, prosecuting attorneys, and circuit court stenographers, may be paid by the state with the approval of the state administrative board.

CHAPTER XVI.

Miscellaneous Provisions.

Warrant to search property.

SECTION 1. When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases, that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular house or place, such magistrate, if he be satisfied that there is reasonable cause for such belief, shall issue a warrant to search for such property.

Search warrant, when issued.

SEC. 2. Any magistrate may also, upon like complaint made on oath, issue a search warrant, when satisfied that there is reasonable cause, in the following cases, to-wit:

Counterfeit coins.

(1) To search for and seize any counterfeit or spurious coin, forged bank notes or other forged instruments, or any

tools, machines or materials prepared or provided for making either of them;

Books, etc.

(2) To search for and seize any books, pamphlets, ballads, codes, printed papers or other things containing obscene language or obscene prints, pictures, figures or descriptions, manifestly tending to corrupt the morals of youth and intended to be sold, loaned, circulated or distributed, or to be introduced into any family, school or place of education;

Lottery tickets.

(3) To search for and seize lottery tickets, or materials for a lottery, unlawfully made, provided or procured for the purpose of drawing a lottery;

Gaming apparatus, etc.

(4) To search for and seize any gaming apparatus or implements used or kept and provided to be used in unlawful gaming, in any gaming house, or in any building, apartment or place resorted to for the purpose of unlawful gaming;

(5) In all cases in which a magistrate or court may issue search warrants under any other law of this state providing for the same.

To whom warrant directed.

SEC. 3. All search warrants shall be directed to the sheriff or any peace officer of the county, commanding such officer to search in the day time, the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and the property or things to be searched for, shall be designated and described in the warrant, and to bring such property or other things before the magistrate issuing the warrant.

Search in night time.

SEC. 4. If there be positive proof that any property, stolen or embezzled, is concealed in any particular house or place, or that any such other things are then in any particular house or place, the warrant may authorize the searching of such house or place in the night time.

Property, by whom kept.

SEC. 5 When any officer in the execution of a search warrant shall find any stolen or embezzled property or shall seize any of the other things for which a search warrant is allowed by the provisions of this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced or used as evidence on any trial; and as soon as may be afterwards all such stolen or embezzled property shall be restored to the owner thereof, and all the other things seized by virtue of any such warrant, shall be destroyed under the direction of the court or magistrate.

Governor may appoint agents.

SEC. 6. The governor of this state may in any case authorized by the constitution and laws of the United States, appoint agents to demand of the executive authority of any other state or territory, or from the executive authority of any foreign government, any fugitive from justice or any person charged with treason; and the accounts of the agents appointed for that purpose shall, unless otherwise directed by the governor, be audited by the auditor general and paid out of the state treasury.

When governor to issue warrant.

SEC. 7. Whenever a demand shall be made upon the governor of this state by the governor of any other state or territory in any case authorized by the constitution and laws of the United States for the delivery over of any person charged in such state or territory with treason, felony or any other crime and there shall be produced with such demand a copy of the indictment found or information filed, or affidavit or complaint made before a magistrate of the state or territory demanding, charging the person so demanded with having committed treason, felony, or other crime within such state or territory, duly certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, with due proof of the fleeing, it shall be the duty of the governor of this state to issue an order or warrant to the sheriff of the county in which such person so charged may be found, commanding him to forthwith arrest such alleged fugitive and to deliver him to the duly authorized agent appointed by the executive authority making such demand to receive him and remove him to the proper place for prosecution. But the sheriff, while the alleged fugitive is in his custody and before delivering him up to the agent of the demanding state, shall afford him every facility to enable him to have a judicial examination if he desires it, by habeas corpus or otherwise, to ascertain whether the demand and arrest have been made comformably to the requirements of law so that such person if he ought not to be delivered may be duly discharged, and the attorney general when required by the governor shall forthwith investigate the grounds of demand and report to the governor all material facts, which may come to his knowledge, as to the situation and circumstances of the person so demanded, and especially whether he is held in custody or is under recognizance to answer for any offense against the laws of this state, or of the United States or by virtue of any civil process, and also whether such demand was made conformably to law, so that such person ought not to be delivered up.

May have judicial examination.

Agent to execute warrant.

SEC. 8. If the governor shall be satisfied that the demand is conformable to law, and ought to be complied with, he shall issue his warrant, under the seal of the state, authorizing the agents who make such demand, either forthwith or at such time as shall be designated in the warrant, to take and transport such person to the line of this state, at the expense of such agents, and shall also by such warrant require the civil officers within this state to afford all needful assistance in the execution thereof.

Offense committed in other state.

SEC. 9. Whenever any person shall be found within this state charged with any offense committed in any other state or territory and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor of such other state or territory, any court or magistrate authorized to issue warrants in criminal cases, may upon complaint on oath setting forth the offense, and such other

matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate, within this state, to answer to such complaint as in other cases.

Recognizance.

SEC. 10. If, upon the examination of the person charged, it shall appear to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the governor, he shall if not charged with a capital crime, or with murder in the first degree, be required to recognize, with sufficient sureties, in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the governor, and to abide the order of such court or magistrate in the premises.

When committed to prison.

SEC. 11. If such person shall not recognize, or if he shall be charged with a capital crime, or with the crime of murder in the first degree, he shall be committed to prison and there detained until such day in like manner as if the offense charged had been committed within this state; and if the person so recognizing shall fail to appear according to the condition of his recognizance, he shall be defaulted and the same proceedings shall be had as in the case of other recognizances entered into before such court or magistrate.

When discharged.

SEC. 12. If the person so recognized or committed, shall appear before the court or magistrate upon the day ordered, he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the governor to receive him, or unless the court or magistrate shall see cause to commit him, or to require him to recognize anew for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and detained as before:

Proviso.

Provided, That whether the person so charged shall be recognized, committed or discharged, any person authorized by the warrant of the governor may, at all times, take him into custody and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

Complainant to pay costs.

SEC. 13. The complainant in any such case shall be answerable for all the actual costs and charges and for the support in prison of any person so committed, to be paid weekly or otherwise as may be ordered by the court or magistrate; and if the charge for his support in prison shall not be so paid, the jailer may on the failure of the complainant discharge such person from his imprisonment.

When prosecutors not to defend.

SEC. 14. It shall be unlawful for any prosecuting attorney of this state to defend or assist in the defense of any person charged with crime within the county of which he is prosecuting attorney.

When criminal case transferred.

SEC. 15. When any criminal cases commenced by the people of the state of Michigan within any county of this state shall be transferred to another county for trial for any reason whatsoever, the prosecuting attorney of the county to which said cause is transferred shall be prohibited from de-

fending or assisting in the defense of the cause so transferred; and in case the prosecuting attorney of the county to which said cause is transferred shall be employed to assist in the prosecution of said cause, the county from which said cause was transferred shall pay such charges to such prosecuting attorney as the court may allow.

Law partners of prosecutor not to defend.

SEC. 16. It shall not be lawful for the law partner or partners of any prosecuting attorney to be directly or indirectly engaged or interested in the defense of any person or persons charged with any offense, when it is the duty of such prosecuting attorney in his official capacity to prosecute such person or persons.

Penalty for violation.

SEC. 17. Any person violating the provisions of the preceding section shall be deemed guilty of a misdemeanor and upon conviction thereof before any court of competent jurisdiction shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding three months, or both in the discretion of the court.

Prosecutor may procure assistance.

SEC. 18. The prosecuting attorney may, under the direction of the court, procure such assistance in the trial of any person charged with a felony as he may deem necessary for the trial thereof, and the prosecuting attorney may, under the direction of the court, in case of disability of the prosecuting attorney, appoint an assistant to perform his duties during the disability of the prosecuting attorney, and such assistant shall be allowed such reasonable compensation as the board of supervisors or the board of county auditors in counties having county auditors shall determine, for his services to be paid by the county treasurer upon presenting to said board the certificate of the circuit judge of the county for which such services were performed, certifying to the services rendered by such assistant: *Provided,* That no person or attorney shall be employed or appointed as assistant who is interested as attorney or otherwise in any case involving the same facts or circumstances involved in the cases to be conducted or tried by said assistant, or who has received any compensation from any person or persons who are interested in such cases.

Proviso.

Supervisors may offer reward.

SEC. 19. The board of supervisors is hereby authorized to offer and pay out of the general fund of the county not to exceed two thousand dollars as a reward for the arrest and conviction, or for information leading to the arrest and conviction of any person or persons having committed a crime within the county or having escaped from any penal institution therein: *Provided,* That the powers granted hereby may be exercised by the finance committee of the board of supervisors when said board of supervisors is not in session.

Proviso.

CHAPTER XVII.

Repeals.

Acts, etc., repealed.

SECTION 1. The following sections, chapters, acts, and all acts and parts of acts amendatory thereto, are hereby repealed, namely:

Chapter ninety-four of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand seven hundred sixty-nine to fifteen thousand seven hundred ninety-six inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred fifty-one of the revised statutes of eighteen hundred forty-six, being sections fifteen thousand six hundred twenty-three to fifteen thousand six hundred twenty-six inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-one of the revised statutes of eighteen hundred forty-six, being sections fifteen thousand six hundred three to fifteen thousand six hundred twenty-two inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-two of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand six hundred twenty-seven to fifteen thousand six hundred forty-three inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-three of the revised statutes of eighteen hundred forty-six, as amended and added to, being sections fifteen thousand six hundred sixty-five to fifteen thousand six hundred ninety-eight inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-four of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand seven hundred two to fifteen thousand seven hundred thirty-eight of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-five of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand eight hundred fifteen to fifteen thousand eight hundred twenty-nine inclusive, except section fifteen thousand eight hundred twenty, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-six of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand eight hundred thirty-six to fifteen thousand eight hundred forty-two inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-seven of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand six hundred forty-five to fifteen thousand six hundred fifty-five of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-eight of the revised statutes of eighteen hundred forty-six, as amended, being sections fifteen thousand eight hundred forty-three to fifteen thousand eight hundred fifty-five, inclusive, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred sixty-nine of the revised statutes of eighteen hundred forty-six, as amended, except section four, being sections fifteen thousand eight hundred ninety-six to fifteen thousand nine hundred six, inclusive, except section fifteen thousand nine hundred, of the compiled laws of nineteen hundred fifteen;

Chapter one hundred seventy of the revised statutes of eighteen hundred forty-six, as amended and added to, being sections fifteen thousand eight hundred seventy-nine to fifteen thousand eight hundred ninety-six of the compiled laws of nineteen hundred fifteen;

Act ninety-eight of the public acts of eighteen hundred forty, being section fifteen thousand six hundred ninety-nine of the compiled laws of nineteen hundred fifteen;

Act seventy-seven of the public acts of eighteen hundred forty-nine, being sections fifteen thousand nine hundred seven, fifteen thousand nine hundred eight and fifteen thousand nine hundred nine of the compiled laws of nineteen hundred fifteen;

Act two hundred twenty-six of the public acts of eighteen hundred forty-nine, being section fifteen thousand nine hundred eleven of the compiled laws of nineteen hundred fifteen;

Act two hundred fifty-eight of the public acts of eighteen hundred forty-nine, being sections fifteen thousand seven hundred ninety-seven to fifteen thousand eight hundred eight inclusive, of the compiled laws of nineteen hundred fifteen;

Act one hundred nineteen of the public acts of eighteen hundred fifty, being sections fifteen thousand three hundred forty-seven, fifteen thousand three hundred forty-eight and fifteen thousand three hundred forty-nine of the compiled laws of nineteen hundred fifteen;

Section three of act one hundred sixty-two of the public acts of eighteen hundred fifty, being section fifteen thousand eight hundred fifty-six of the compiled laws of nineteen hundred fifteen;

Section three of act one hundred sixty-six of the public acts of eighteen hundred fifty-one;

Act seventy-seven of the public acts of eighteen hundred fifty-five, being sections fifteen thousand seven hundred thirty-nine to fifteen thousand seven hundred fifty-nine inclusive, of the compiled laws of nineteen hundred fifteen;

Act one hundred nine of the public acts of eighteen hundred fifty-seven, being sections fifteen thousand nine hundred twelve, fifteen thousand nine hundred thirteen and fifteen thousand nine hundred fourteen of the compiled laws of nineteen hundred fifteen;

Act one hundred thirty-eight of the public acts of eighteen hundred fifty-nine, being sections fifteen thousand seven hundred sixty to fifteen thousand seven hundred sixty-eight, inclusive, of the compiled laws of nineteen hundred fifteen;

Act one hundred fifty-nine of the public acts of eighteen hundred fifty-nine, being sections fifteen thousand six hundred ninety-seven and fifteen thousand six hundred ninety-eight of the compiled laws of nineteen hundred fifteen;

Act two hundred twenty-eight of the public acts of eighteen hundred fifty-nine, being section fifteen thousand seven hundred one of the compiled laws of nineteen hundred fifteen;

Act eighty-eight of the public acts of eighteen hundred sixty-one, being sections fifteen thousand six hundred fifty-six, fifteen thousand six hundred fifty-seven and fifteen thousand six hundred fifty-eight of the compiled laws of nineteen hundred fifteen;

Act one hundred ninety-five of the public acts of eighteen hundred sixty-one, being sections fifteen thousand eight hundred ninety-four and fifteen thousand eight hundred ninety-five of the compiled laws of nineteen hundred fifteen;

Act two hundred nine of the public acts of eighteen hundred sixty-one, being sections fifteen thousand eight hundred thirty-one and fifteen thousand eight hundred thirty-two of the compiled laws of nineteen hundred fifteen;

Act two hundred twenty-three of the public acts of eighteen hundred sixty-one, being section fifteen thousand nine hundred sixteen of the compiled laws of nineteen hundred fifteen;

Act one hundred forty-seven of the public acts of eighteen hundred sixty-three, being sections fifteen thousand seven hundred sixty to fifteen thousand seven hundred sixty-eight, inclusive, of the compiled laws of nineteen hundred fifteen;

Act one hundred seventy of the public acts of eighteen hundred sixty-seven, being section fifteen thousand eight hundred fifty-seven of the compiled laws of nineteen hundred fifteen;

Act fifty-seven of the public acts of eighteen hundred seventy-three, being sections fifteen thousand six hundred sixty and fifteen thousand six hundred sixty-one of the compiled laws of nineteen hundred fifteen;

Act one hundred seventeen of the public acts of eighteen hundred seventy-three, being section fifteen thousand eight hundred twenty of the compiled laws of nineteen hundred fifteen;

Act ninety-nine of the public acts of eighteen hundred seventy-five, being section fifteen thousand eight hundred thirty of the compiled laws of nineteen hundred fifteen;

Act one hundred seventy-seven of the public acts of eighteen hundred seventy-five, being section fifteen thousand six hundred forty-four of the compiled laws of nineteen hundred fifteen;

Act twenty-four of the public acts of eighteen hundred seventy-seven, being section fifteen thousand nine hundred eleven of the compiled laws of nineteen hundred fifteen;

Act eighty-two of the public acts of eighteen hundred seventy-seven, being section fifteen thousand six hundred ninety-nine of the compiled laws of nineteen hundred fifteen;

Act one hundred forty-one of the public acts of eighteen hundred seventy-nine, being section fifteen thousand six hundred forty-four of the compiled laws of nineteen hundred fifteen;

Act two hundred twelve of the public acts of eighteen hundred seventy-nine, being sections fifteen thousand eight hundred nine and fifteen thousand eight hundred ten of the compiled laws of nineteen hundred fifteen;

Act two hundred fourteen of the public acts of eighteen hundred seventy-nine, being section fifteen thousand nine hundred of the compiled laws of nineteen hundred fifteen;

Act one hundred thirty-nine of the public acts of eighteen hundred eighty-one, being section fifteen thousand six hundred fifty-nine of the compiled laws of nineteen hundred fifteen;

Act two hundred five of the public acts of eighteen hundred eighty-one, being sections fifteen thousand eight hundred thirteen and fifteen thousand eight hundred fourteen of the compiled laws of nineteen hundred fifteen;

Act eighty-four of the public acts of eighteen hundred eighty-three, being sections fifteen thousand six hundred sixty-two, fifteen thousand six hundred sixty-three and fifteen thousand six hundred sixty-four of the compiled laws of nineteen hundred fifteen;

Section one of act one hundred eight of the public acts of eighteen hundred eighty-three, being section fifteen thousand eight hundred eleven of the compiled laws of nineteen hundred fifteen;

Act seventy-seven of the public acts of eighteen hundred eighty-seven, being section fifteen thousand eight hundred fifty-eight of the compiled laws of nineteen hundred fifteen;

Act one hundred thirty-two of the public acts of eighteen hundred eighty-seven, being sections fifteen thousand five hundred eighty-six, fifteen thousand five hundred eighty-seven, fifteen thousand five hundred eighty-eight and fifteen thousand five hundred eighty-nine of the compiled laws of nineteen hundred fifteen;

Section three of act twelve of the public acts of eighteen hundred ninety-one;

Sections sixty-four and sixty-five of act one hundred eighteen of the public acts of eighteen hundred ninety-three, being sections one thousand seven hundred sixty-two and one thousand seven hundred sixty-three of the compiled laws of nineteen hundred fifteen;

Section nineteen of act one hundred twenty-four of the public acts of eighteen hundred ninety-three, being section

one thousand four hundred twenty-four of the compiled laws of nineteen hundred fifteen;

Act one hundred seventy-six of the public acts of eighteen hundred ninety-three, being sections fifteen thousand eight hundred thirty-three, fifteen thousand eight hundred thirty-four and fifteen thousand eight hundred thirty-five of the compiled laws of nineteen hundred fifteen;

Act one hundred thirty-eight of the public acts of eighteen hundred ninety-five, being section fifteen thousand seven hundred of the compiled laws of nineteen hundred fifteen;

Section two of act fifty-eight of the public acts of nineteen hundred three, being section fifteen thousand eight hundred fourteen of the compiled laws of nineteen hundred fifteen;

Act ninety-one of the public acts of nineteen hundred three;

Sections one, two, three and four of act one hundred eighty-four of the public acts of nineteen hundred five, being sections fifteen thousand eight hundred fifty-nine, fifteen thousand eight hundred sixty, fifteen thousand eight hundred sixty-one and fifteen thousand eight hundred sixty-two of the compiled laws of nineteen hundred fifteen;

Section nineteen of act two hundred thirty-eight of the public acts of nineteen hundred five, being section one thousand four hundred twenty-four of the compiled laws of nineteen hundred fifteen;

Section one of act four of the public acts of nineteen hundred nine, being section fifteen thousand eight hundred thirty-two of the compiled laws of nineteen hundred fifteen;

Act two hundred sixty of the public acts of nineteen hundred nine, being section fifteen thousand nine hundred sixteen of the compiled laws of nineteen hundred fifteen;

Section one of act twenty-three of the public acts of nineteen hundred eleven, being section fifteen thousand nine hundred twelve of the compiled laws of nineteen hundred fifteen;

Act one hundred five of the public acts of nineteen hundred thirteen, being sections two thousand twenty-nine to two thousand forty-five, inclusive, of the compiled laws of nineteen hundred fifteen;

Act one hundred thirty-four of the public acts of nineteen hundred fifteen;

Section sixty-five of act thirty-five of the public acts of nineteen hundred seventeen;

Act one hundred fifty-nine of the public acts of nineteen hundred seventeen;

Act one hundred ninety-six of the public acts of nineteen hundred seventeen;

Act two hundred eight of the public acts of nineteen hundred seventeen;

Act two hundred fifty of the public acts of nineteen hundred seventeen;

Act three hundred twenty-nine of the public acts of nineteen hundred seventeen;

Act three hundred thirty-two of the public acts of nineteen hundred nineteen;

Act three hundred eighty-five of the public acts of nineteen hundred nineteen;

Sections ten and eleven of act one hundred forty-three of the public acts of nineteen hundred twenty-one;

Sections two, three and four of act two hundred three of the public acts of nineteen hundred twenty-one;

Act two hundred forty-eight of the public acts of nineteen hundred twenty-one;

Section three of act two hundred fifty-nine of the public acts of nineteen hundred twenty-one;

Section two of act three hundred ninety-five of the public acts of nineteen hundred twenty-one;

Act three hundred ninety-nine of the public acts of nineteen hundred twenty-one;

Section fifty-four of act one hundred fifty-one of the public acts of nineteen hundred twenty-three;

Section two of act two hundred fifty-three of the public acts of nineteen hundred twenty-three;

Act two hundred seventy-one of the public acts of nineteen hundred twenty-three;

Section fifteen of act fifty of the public acts of nineteen hundred twenty-five;

Act one hundred twenty-four of the public acts of nineteen hundred twenty-five;

Section one of act one hundred thirty-nine of the public acts of nineteen hundred twenty-five;

Act two hundred three of the public acts of nineteen hundred twenty-five;

Sections six and nineteen of act three hundred two of the public acts of nineteen hundred twenty-five;

Section seven of act three hundred sixty-two of the public acts of nineteen hundred twenty-five;

Act seventeen of the public acts of nineteen hundred twenty-six, extra session.

Saving Clause.

SEC. 2. This act is declared to be severable and if any section or part of a section shall be held to be unconstitutional, the validity of the balance of the act shall not be affected thereby.

SEC. 3. All acts and parts of acts inconsistent with or contravening the provisions of this act are hereby repealed.

Approved May 14, 1927.

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[No. 311.]

AN ACT to amend sections 3, 4, 5 and 6 of chapter 7 of Act No. 175 of the Public Acts of 1927, entitled "An act to revise, consolidate and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts and of the judges and other officers thereof under the provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses; to provide for the arrest of persons charged with or suspected of criminal offenses; to provide for bail of persons arrested for or accused of criminal offenses; to provide for the examination of such persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and to provide for the procedure therein; to provide for judgments and sentences of persons convicted of criminal offenses; to provide for procedure relating to new trials, appeals, writs of error and bills of exception in criminal causes; to provide a uniform system of probation throughout the state of Michigan, the appointment of probation officers and to prescribe the powers, duties and compensation of such officers and to provide penalties for the violation of the duties of such officers; to provide for procedure governing proceedings to prevent crime; proceedings for the discovery of crime; to provide for the jurisdiction, powers, duties, and procedure of justices of the peace in criminal cases; to provide for fees of officers, witnesses and others in criminal cases; miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act and to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act," section 4 as amended by Act No. 33 of the Public Acts of 1947, being sections 767.3, 767.4, 767.5 and 767.6, respectively, of the Compiled Laws of 1948; and to add to said chapter a new section to stand as section 5a thereof.

The People of the State of Michigan enact:

Sections amended and added.

Section 1. Sections 3, 4, 5 and 6 of chapter 7 of Act No. 175 of the Public Acts of 1927, section 4 as amended by Act No. 33 of the Public Acts of 1947, being sections 767.3, 767.4, 767.5 and 767.6, respectively, of the Compiled Laws of 1948, are hereby amended, and a new section is hereby added to said chapter to stand as section 5a thereof, said amended and added sections to read as follows:

CHAPTER 7.

767.3 Grand jury; proceedings before trial; number of judges, selection, action en banc upon complaint; order directing inquiry; summoning, etc., witnesses, procedure; subpoena, service; take testimony; concurrence by judges in orders, etc.; indictments, signatures; grand jury prosecutors, disqualification; inquiry, time limitation. [M.S.A. 28.943]

Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace or police judge shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, he shall refer such complaint together with his recommendations thereon to a circuit judge or judge of a court of record having jurisdiction in criminal causes in any county of this state.

Whenever a complaint shall be filed with any circuit judge or judge of a court of record having jurisdiction in criminal causes in any county of this state, which complaint may be upon information and belief, or whenever any complaint has been referred to such judge by any justice of the peace or police judge, and such judge shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, such circuit judge or judge of a court of record shall forthwith call 2 other judges of such court in said county to consider and act en banc with him upon such complaint: Provided, That if there are not 3 circuit judges or judges of a court of record having jurisdiction in criminal causes in such county, then the presiding circuit judge of Michigan shall upon notification thereof by such judge, forthwith designate 1 or

more circuit judges as shall be necessary to serve for such purpose. Whenever, by reason of the filing of such complaint, which may be upon information and belief, such 3 judges sitting en banc shall determine that there is probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within such county, and that any person may be able to give any material evidence respecting such offense, such 3 judges in their discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry, and shall require such persons as they may deem necessary to attend as witnesses and answer such questions as said judges may require concerning any violation of law about which they may be questioned; and the proceedings to summon such witnesses and to compel them to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings: Provided, That before issuance of any summons there shall be an attestation by the judges that there is reasonable ground to believe that the witness to be summoned has knowledge of matters pertinent to the inquiry. Whenever a subpoena shall be issued by the judges conducting such inquiry commanding the appearance of a witness before such judges, forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the judges so issuing the same shall be notified of such fact forthwith by the officer who served the subpoena, and it shall thereupon be the duty of the judges to appear and take the testimony of such witness without unreasonable delay. The testimony of all witnesses shall be taken, in the presence of all 3 judges, either in the court room or other suitable public building wherein the secrecy of the proceedings may be maintained.

No order, decision or finding by said judges shall be valid unless concurred in by 2 of them: Provided, That orders returning indictments shall be signed by 3 judges.

Any judges, prosecuting attorneys or special prosecuting attorneys, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than 2 years from date of termination of such inquiry, as determined by final order of said judges entered prior to such date. No special grand jury prosecutor shall be eligible for reappointment as a special grand jury prosecutor within a period of 3 years and the fees paid for said services shall not exceed $5,000.00 in any 6 months period: Provided, That the total amount paid to any grand jury prosecutor shall not exceed $10,000.00.

No inquiry hereunder shall continue longer than 6 months unless extended by specific order of the said judges: Provided, That such extension shall terminate within 6 months, unless extended by specific order for like periods.

767.4 Same; apprehension of suspect; disqualification as examining magistrate, finding as to misconduct in office; confidential information; penalty for disclosing information or evidence involving inquiry; report filed with clerk of county; appointment of successor judge. [M.S.A. 28.944]

Sec. 4. If upon such inquiry the judges shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, they may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the judges having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint: Provided, That the judges conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing upon any charge of contempt under section 5 hereof. And if upon such inquiry the judges shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said judges

shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judges, prosecuting attorney and other person or persons who may, at the discretion of such judges, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors. Any judges conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judges be admitted to such inquiry, who shall while in the services of said grand jury or after his services with the grand jury shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or other recognizance, or who shall disclose that any person has been questioned or subpoenaed in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $500.00, or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry the judge shall make no presentment of crime or wrongdoing as to any person or persons whose apprehension or removal from office he has not so caused, but may, in his discretion, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

In the event any of the judges conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

767.5 Same; failure of witness to appear or answer question; hearing in open court; penalty. [M.S.A. 28.945]

Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judges may require material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $100.00 or imprisonment in the county jail not exceeding 60 days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such question, the judges may in their discretion commute or suspend the further execution of such sentence.

767.5a Communications confidential and privileged. [M.S.A. 28.945(1)]

Sec. 5a. In any inquiry authorized by this act no communication between reporters for newspapers or other publications and their informants, between attorneys and their clients, between clergymen and members of their respective churches, and between physicians and their patients shall be inquired into or be divulged by any witness. All such communications are hereby declared to be confidential and privileged.

767.6 Incriminating answers of witness. [M.S.A. 28.946]

Sec. 6. No person shall upon such inquiry be required to answer any questions, nor shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him.

Approved June 17, 1949.

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[No. 275.]

AN ACT to amend section 1 of Act No. 3 of the Public Acts of 1939, entitled "An act to provide for the regulation and control of public utilities and other services affected with a public interest within this state; to create a public service commission and to prescribe and define the powers and duties thereof; to abolish the Michigan public utilities commission, and to confer the powers and duties now vested by law therein, on the public service commission hereby created; to provide for the continuance, transfer and completion of matters and proceedings now pending; to provide for appeals; to provide appropriations therefor; to declare the effect of this act and prescribe penalties for the violations of the provisions thereof; and to repeal all acts contrary to the provisions of this act," as amended, being section 460.1 of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section amended.

Section 1. Section 1 of Act No. 3 of the Public Acts of 1939, as amended, being section 460.1 of the Compiled Laws of 1948, is hereby amended to read as follows:

460.1 Public service commission, creation; members, appointment, qualifications, terms, vacancies. [M.S.A. 22.13(1)]

Sec. 1. A commission to be known and designated as the "Michigan public service commission" is hereby created, which shall consist of 3 members, not more than 2 of whom shall be members of the same political party, appointed by the governor with the advice and consent of the senate. Each member shall be a citizen of the United States, and of the state of Michigan, and no member of said commission shall be pecuniarily interested in any public utility or public service subject to the jurisdiction and control of the commission. During his term no member shall serve as an officer or committee member of any political party organization or hold any office or be employed by any other commission, board, department or institution in this state. No commission member shall be retained or employed by any public utility or public service subject to the jurisdiction and control of the commission during the time he is acting as such commissioner, and for 6 months thereafter, and no member of the commission, who is a member of the bar of the state of Michigan, shall practice his profession or act as counselor or attorney in any court of this state during the time he is a member of said commission: Provided, however, This shall not require any commissioner to retire from, or dissolve any partnership, of which he is a member, but said partnership, while he is a member of the commission, shall not engage in public utility practice. Immediately upon the taking effect of this act, the offices of the present members of the Michigan public service commission are hereby abolished, and the members of the Michigan public service commission as herein created shall be appointed by the governor with the advice and consent of the senate, for terms of 6 years each: Provided, That of the members first appointed, 1 shall be appointed for a term of 2 years, 1 for a term of 4 years, and 1 for a term of 6 years. Upon the expiration of said terms successors shall be appointed with like qualifications and in like manner for terms of 6 years each, and until their successors are appointed and qualified. Vacancies shall be filled in the same manner as is provided for appointment in the first instance.

Approved June 21, 1951.

[No. 276.]

AN ACT to amend sections 3, 4, 5, 5a and 6 of chapter 7 of Act No. 175 of the Public Acts of 1927, entitled "An act to revise, consolidate and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts and of the judges and other officers thereof under the provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses; to provide for the arrest of persons charged with or suspected of criminal offenses; to provide for bail of persons arrested for or accused

of criminal offenses; to provide for the examination of such persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and to provide for the procedure therein; to provide for judgments and sentences of persons convicted of criminal offenses; to provide for procedure relating to new trials, appeals, writs of error and bills of exception in criminal causes; to provide a uniform system of probation throughout the state of Michigan, the appointment of probation officers and to prescribe the powers, duties and compensation of such officers and to provide penalties for the violation of the duties of such officers; to provide for procedure governing proceedings to prevent crime; proceedings for the discovery of crime; to provide for the jurisdiction, powers, duties, and procedure of justices of the peace in criminal cases; to provide for fees of officers, witnesses and others in criminal cases; miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act and to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act," as amended by Act No. 311 of the Public Acts of 1949, being sections 767.3, 767.4, 767.5, 767.5a and 767.6, respectively, of the Compiled Laws of 1948; and to add to said chapter 3 new sections to stand as sections 4a, 6a and 6b thereof.

The People of the State of Michigan enact:

Sections amended and added.

Section 1. Sections 3, 4, 5, 5a and 6 of chapter 7 of Act No. 175 of the Public Acts of 1927, as amended by Act No. 311 of the Public Acts of 1949, being sections 767.3, 767.4, 767.5, 767.5a and 767.6, respectively, of the Compiled Laws of 1948, are hereby amended and 3 new sections are hereby added to said chapter to stand as sections 4a, 6a and 6b thereof, said amended and added sections to read as follows:

CHAPTER 7.

767.3 Grand juries; proceedings before trial; inquiry, order, conducting; summoning witnesses, proceedings, fees, subpoena, appearance; notification to judge; taking testimony; legal counsel; revelation by attorney, penalty; testimony in presence of judge; disqualification of judge, etc. [M.S.A. 28.943]

Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor shall have been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings, and said witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the said inquiry being conducted. Whenever a subpoena shall be issued by the judge conducting such inquiry, commanding the appearance of a witness before such judge forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the judge so issuing the same shall be forthwith notified of such appearance by the officer serving

the subpoena, and it shall thereupon be the duty of such judge forthwith to appear and take the testimony of such witness. Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than 1 year from date of termination of such inquiry, as determined by final order of said judge entered prior to such date.

767.4 Same; apprehension of suspect; disqualification as examining magistrate; finding as to misconduct in office; disclosures of proceedings, etc., penalty; report of no finding of criminal guilt; period of inquiry; successor judge, appointment. [M.S.A. 28.944]

Sec. 4. If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint: Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. And if upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of such judge or after his services with such judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both such fine and imprisonment in the discretion of

the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry if the judge shall make no presentment of crime or wrongdoing as to any person or persons whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.

In the event any judge conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

767.4a Testimony, exhibits, etc., unlawful possession, use, etc., of; exceptions, penalty. [M.S.A. 28.944(1)]

Sec. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

767.5 Failure of witness to appear or answer questions, hearing, penalty; commutation or suspension of sentence. [M.S.A. 28.945]

Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided, That if such witness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence.

767.5a Certain communications declared privileged and confidential. [M.S.A. 28.945(1)]

Sec. 5a. In any inquiry authorized by this act communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential. Any communications between attorneys and their clients, between clergymen and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergyman, or physician.

767.6 Incriminating answers of witnesses, immunity order, delivery to witness; transcript; secrecy. [M.S.A. 28.946]

Sec. 6. No witness shall upon such inquiry be required to answer any questions, or shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such judge advises the witness that said immunity

no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.

767.6a Docket, journal, etc., sealing and filing; available in connection with appeal, order, receipt; destruction of transcripts, notes and records. [M.S.A. 28.946(1)]

Sec. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

767.6b Public accounting by judge, filing. [M.S.A. 28.946(2)]

Sec. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

Approved June 27, 1951.